[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19520

W. R. Grace & Co., Petitioner,

vs.

Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago and Southern Air Lines, Inc., Taca, S. A., Department of Justice of the United States of America, and Pan American-Grace Airways, Inc., Respondents.

Notice of Motion to Dismiss or to Affirm Forthwith

To: Wright, Gordon, Zachry, Parlin & Cahill, Esqs., Attorneys for Petitioner, 63 Wall Street, New York 5, New York; Root, Clark, Buckner & Ballantine, Esqs., Attorneys for Respondents Pan American Airways Corporation and Pan American Airways, Inc., 31 Nassau Street, New York 5, New York; Gambrell & White, Esqs., Attorneys for Respondent Eastern Air Lines, Inc., Suite 825, The Citizens & Southern National Bank Bldg., Atlanta 3, Georgia; Denning & Cross, Esqs., Attorneys for Respondent National Airlines, Inc., Investment Building, Washington 5, D. C.; H. R. Bolander, Jr., Esq., Attorney for Respondent Chicago and Southern Air Lines, Inc., Municipal Airport, Memphis 2, Tennessee; Willkie, Owen, Otis, Farr & Gallagher, Esqs., Attorneys for Respondent TACA, S. A., 15 Broad Street, New York, New York; W. H. Cogswell, Esq., 7 Hanover Square, New York, New York, and H. Preston Morris, Esq., 135 East 42nd Street, New York, New York, Attorneys for Respondent Pan American-Grace Airways, Inc.

Sirs:

Please take notice that upon the motion of respondent Civil Aeronautics Board affixed hereto, together with the exhibits thereto attached, and upon all the pleadings filed and proceedings hitherto had herein, the undersigned will

move this Court, at a Motion Term thereof, to be held at [fol. 2] the United States Court House, Foley Square, Borough of Manhattan, City of New York, on March 12, 1945, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the petition for review herein, or, in the alternative, for an order affirming forthwith the orders sought to be reviewed thereby, on the grounds stated in the aforesaid motion.

February 1, 1945.

Wendell Berge, Assistant Attorney General, George C. Neal, General Counsel, Civil Aeronautics Board, Attorneys for Respondent, Civil Aeronautics Board.

Of Counsel: Arne C. Wiprud, Lawrence S. Apsey, Edward Dumbauld, Special Assistants to the Attorney General; James A. Tomlinson, Special Attorney, Department of Justice; John H. Wanner, Assistant General Counsel, Civil Aeronautics Board; Louis W. Goodkind, Senior Attorney, Civil Aeronautics Board; Vernon C. Kohlhaas, Associate Attorney, Civil Aeronautics Board.

MOTION OF RESPONDENT CIVIL AERONAUTICS BOARD

Now comes the respondent Civil Aeronautics Board, by its attorneys, Wendell Berge, Assistant Attorney General, and George C. Neal, General Counsel of the Civil Aeronautics Board, and respectfully moves the Court to dismiss the petition for review herein for want of jurisdiction, or, in the alternative, to affirm forthwith the orders of which review is sought by said petition (copies of which orders are annexed hereto as Exhibits A, B and C), upon the grounds that the petitioner, W. R. Grace & Co., has no standing herein to seek review of the said orders and that the said orders are not subject to review, which grounds are more particularly stated as follows:

[fol. 3] A. Petitioner has not disclosed, and cannot disclose, the "substantial interest" in the orders complained of which is required for the filing of a petition for review by section 1006(a) of the Civil Aeronautics Act of 1938, as amended [49 U. S. C. A. 646(a)];

B. No case or controversy is before the Court to which the judicial power extends;

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C. The mandatory type of relief sought, in practical effect, by said petition for review cannot be invoked where, as herein, it is not clear beyond peradventure of doubt that the renunciation of administrative jurisdiction, expressed in the orders sought to be reviewed, was erroneous.

Wherefore, Respondent Civil Aeronautics Board respectfully moves that the petition for review herein be dismissed, or, in the alternative, that the orders of which review is sought be forthwith affirmed, and for such other and further relief as to the Court may seem just and proper.

February 1, 1945.

Wendell Berge, Assistant Attorney General, George C. Neal, General Counsel, Civil Aeronautics Board, Attorneys for Respondent, Civil Aeronautics Board.

Of Counsel: Arne C. Wiprud, Lawrence S. Apsey, Edward Dumbauld, Special Assistants to the Attorney General; James A. Tomlinson, Special Attorney, Department of Justice; John H. Wanner, Assistant General Counsel, Civil Aeronautics Board; Louis W. Goodkind, Senior Attorney, Civil Aeronautics Board; Vernon C. Kohlhaas, Associate Attorney, Civil Aeronautics Board.

[fol. 4]

EXHIBIT A

Orders
Serial Number 2586
Served:

UNITED STATES OF AMERICA, CIVIL AERONAUTICS BOARD

Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 17th day of December, 1943

Docket No. 779

In the matter of the alteration, amendment, and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC., under section 401 (h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.

ORDER

W. R. Grace and Company, having filed a motion on December 3, 1943, requesting the Board to defer oral argument on and consideration of the motion of Pan American Airways Corporation to dismiss the above-entitled proceeding for want of jurisdiction until the final argument upon the merits, subsequent to the filing of the examiner's report; and

The Board finding, upon due consideration of all matters set forth in the said motion, that W. R. Grace and Company sets forth insufficient grounds for the relief requested:

It Is Ordered That the said motion be and it is denied.

By the Civil Aeronautics Board:

(S.) Fred A. Toombs, Secretary. (Seal.)

[fol. 5]

EXHIBIT B

Orders

Serial No. 2867

UNITED STATES OF AMERICA, CIVIL AERONAUTICS BOARD

Washington, D. C.

At a session of the Civil Aeronautics Board held at its office in Washington, D. C., on the 24th day of May, 1944.

Docket No. 779

In the Matter of the PANAGRA TERMINAL INVESTIGATION under Section 401 of the Civil Aeronautics Act of 1938, as amended.

Order Dismissing Proceeding

The Board, acting upon its own initiative, having instituted an investigation to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended and modified to authorize and require that the

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route of Pan American-Grace Airways, Inc., between Buenos Aires, Argentina, and Cristobal, Canal Zone, be extended to a terminal in the United States at Miami, Tampa, or St. Petersburg, Florida; and

The Board, upon motions to dismiss said proceeding for lack of jurisdiction, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof, and finding its action in this matter is necessary pursuant to said opinion;

It is ordered, That the proceeding instituted by the Board by its order of September 10, 1942 (Order Serial No. 1928), as amended by its order of October 22, 1942 (Order Serial No. 1991) be, and the same is dismissed.

By the Civil Aeronautics Board:

(S.) Fred A. Toombs.

Fred A. Toombs, Secretary. (Seal.)

[fol. 5-1] 2867

Served:

UNITED STATES OF AMERICA, CIVIL AERONAUTICS BOARD,

Washington, D. C.

Docket No. 779

PANAGRA TERMINAL INVESTIGATION

Decided: May 24, 1944

Section 401(h) of the Act authorizes the Board, on its own initiative, to alter, amend, or modify a certificate of public convenience and necessity by including therein new terminal and intermediate points; but that authority does not permit the addition of new service which would be so extensive as to amount to a new air transportation route, or of such a kind as to substantially change the character of a carrier's system.

The extension of the route of Panagra to a terminal point in Florida would constitute a basic transformation in the

character of that carrier's system and, therefore, cannot be ordered by the Board under section 401(h) of the Act.

Proceedings dismissed.

Appearances: John T. Cahill and Fred J. Knauer for W. R. Grace & Co. Henry J. Friendly and J. P. Kranz, Jr. for Pan American Airways Corporation. E. Smythe Gambrell and W. Glen Harlan for Eastern Air Lines, Inc. William I. Denning and Coates Lear for National Airlines, Inc. H. R. Bolander, Jr. for Chicago and Southern Air Lines, Inc. John H. Wanner, H. Don Reynolds, and Melvin S. Cohen for the Civil Aeronautics Board.

[fol. 5-2] Opinion

By the Board: This proceeding comes before us at this time on a motion to dismiss which challenges the Board's jurisdiction.

Before proceeding to a determination of the principal issue presented to the Board at the present stage of this case, it is necessary to review briefly the circumstances which gave rise to the proceeding. Pan American-Grace Airways, Inc., hereinafter referred to as Panagra, was incorporated in 1929 by its present co-owners Pan American Airways Corporation and W. R. Grace & Co., hereinafter referred to as Grace, each of which purchased, and has at all times since then owned, 50 per cent of Panagra's outstanding capital stock. Shortly after its incorporation, Panagra secured a mail contract with the Postmaster General for the transportation of mail between the Canal Zone and Buenos Aires, Argentina, via various points on the west coast of South America. Operations under the contract were commenced on May 17, 1929, between the Canal Zone and Mollendo, Peru, and were extended to Buenos Aires on or about October 12, 1929. Since that date, Panagra has transported persons, property, and mail on its entire route between the Canal Zone and Buenos Aires. From time to time additional points and local services have been added to the route, so that at the present time its system comprises approximately 8,800 route miles.

Pan American Airways, Inc., a wholly-owned subsidiary of Pan American Airways Corporation, has operated international air transportation services since 1927. Since November 1931, it has operated an air transportation service

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between Miami, Florida, and Buenos Aires by way of points in the Caribbean and on the east coast of South America. In addition to that service, and others, Pan American Airways, Inc., has operated services between Miami and the Canal Zone and between Brownsville, Texas, and the Canal Zone, making connections at the Canal Zone with the services of Panagra.

The route between Miami and Buenos Aires via the Canal Zone and Panagra's west coast route is shorter than the route of Pan American Airways, Inc., between Miami and Buenos Aires via east coast points and the so-called Brazilian cut-off. At no time has Panagra operated regular air transportation service north of the Canal Zone. Although traffic between the United States and points on the west coast of South America and Buenos Aires constitutes a large and important share of Panagra's total business, this traffic has been carried between the United States and the Canal Zone by other carriers, largely by Pan American Airways, Inc., and at that point delivered to or received from Panagra for onward transportation. Most of the business interchanged by Pan American and Panagra at the Canal Zone is carried over Pan American's Miami-Canal Zone route, and originates in or is destined to the eastern seaboard of the United States. Other important contributions to Panagra's traffic flow are made to or from the Canal Zone through the Brownsville gateway, and through [fol. 5-3] the Los Angeles gateway served by Pan American's subsidiary Compania Mexicana, S. A. Some traffic originating on or destined for the north coast of South America is also interchanged with Panagra at the Canal Zone. In addition, Pan American Airways, Inc., has recently been authorized to serve New Orleans, and its New Orleans-Canal Zone service via Central America will enable traffic to be interchanged with Panagra at the Canal Zone.

The New Orleans-Canal Zone route was granted to Pan American by the Board on February 26, 1943, for a three year period.[1] The record in the present proceedings shows that prior to the hearings in the New Orleans case the Grace representatives on the Board of Directors of Panagra urged that Panagra should apply for a route between the Canal

[1] Pan American Airways, Inc., et al.—Service from New Orleans to Cuba and Central America, 4 C. A. B. , decided February 26, 1943.

Zone and New Orleans. This proposal was not acceptable to the Pan American representatives on the Panagra Board. Since Pan American and Grace held equal stock ownership and representation on the Panagra Board, the proposal of the Grace representatives failed for lack of a majority.

When efforts to secure the filing of an application by Panagra failed, Grace filed, on May 3, 1941, a petition for leave to intervene in the New Orleans case alleging that since Panagra was not filing an application Grace proposed to file an application in its own behalf for a certificate for a route between the United States and the Canal Zone. Grace was granted leave to intervene, but did not file an application for a certificate during the time that case was pending.

On December 16, 1941, Grace filed a petition and complaint, Docket No. 707, requesting the Board to institute a proceeding pursuant to section 401 (h) of the Act to alter, amend, and modify Panagra's certificate of public convenience and necessity so as to make the northern terminal of its route a point in the United States such as Miami or Tampa, Florida, or New Orleans, Louisiana. On April 29, 1942, Grace filed a second complaint, Docket No. 744, requesting the Board to require Pan American Airways Corporation, pursuant to section 411 of the Act and sections 7 and 11 of the Clayton Act, to cease and desist from certain matters alleged by Grace to be in violation of those sections, and to divest itself of its ownership of the stock of Panagra to the extent necessary to divest itself of its present negative control of Panagra; and also renewing its request in Docket No. 707.

No formal steps were taken by the Board in connection with the Grace petitions in Dockets Nos. 707 and 744 until September 1942. During this period all action in the New Orleans case also was postponed under the Board's policy, announced December 12, 1941, of suspending further action [fol. 5-4] in all proceedings pending before it under sections 401 (d) and 401 (h) of the Act "in order that the immediate and maximum attention of air carriers and their personnel, and that of the Civil Aeronautics Board, as well as other Government agencies concerned, may be available for the most efficient discharge of the emergency demands" arising out of the war.

However, the Board did explore the possibility of working out a voluntary settlement of the controversy between

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Pan American and Grace. Numerous conferences were held by the Board with both parties. Finally, the Board suggested that the parties enter into an agreement under which sufficient shares of the two stockholders would be transferred to an independent public voting trustee or trustees to permit the election to the Panagra Board of an independent director or directors, or under which such an independent public director or directors might be otherwise appointed, who would be able to break the deadlock resulting from the equal division of the ownership of Panagra stock between Pan American and Grace. After it became apparent that no satisfactory voluntary arrangement could be mutually agreed upon by the parties and that all efforts to mediate the differences between them would be unsuccessful, the Board, on September 10, 1942, issued its order (Serial No. 1928),[2] as amended by its order of October 22, 1942 (Serial No. 1991)[3] instituting the present proceeding.

The proceeding was instituted by the Board pursuant to section 401(h) of the Act, which provides in part as follows:

> "(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate

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[2] "A proceeding is hereby instituted by the Board to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event a terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States."

[3] "Paragraph 1 (a) of the aforesaid order of the Board dated September 10, 1942 (Order Serial No. 1928) be and it is amended by striking out the words 'Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California', and inserting in lieu thereof the words 'Miami, Tampa, or St. Petersburg, Florida.'"

[of public convenience and necessity], in whole or in part, if the public convenience and necessity so require, * * *."

[fol. 5-5] The orders provide that it is the purpose of the proceeding to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require that Panagra's route between Buenos Aires, Argentina, and Cristobal, Canal Zone, be extended to a terminal in the United States at Miami, Tampa, or St. Petersburg, Florida. Grace, Pan American Airways, Inc., and Panagra, were made parties to the proceeding, and subsequently the Department of Justice, Pan American Airways Corporation, National Airlines, Inc., TACA, S. A., Eastern Air Lines, Inc., and Chicago and Southern Air Lines, Inc., were granted permission to intervene.

Hearings in the proceeding began on September 15, 1943. On the same day Pan American Airways Corporation filed with the Board a motion to dismiss the proceeding for want of jurisdiction, which was denied by the Board on September 23, 1943, without prejudice to its renewal at the close of the hearing. Hearings were then completed and Pan American renewed its motion, in which it was joined by Eastern Air Lines and National Airlines. Briefs in support of, and in opposition to, the motion were submitted on January 15, 1944, and oral argument on the motion was heard by the Board on January 31, 1944.

The motion to dismiss asserts that the Board is without power, under the provisions of the Act, to order an extension of Panagra's route from the Canal Zone to Florida. It is contended that section 401 (h) does not grant the Board power to extend the route of an air carrier and, in the alternative, that even though such power is granted, the Board cannot compel the carrier to extend its lines into a territory not previously served by that carrier.

The question presented to us by the motion is one of statutory construction; namely, does the power of the Board under section 401 (m) to "alter," "amend," and "modify" a certificate of public convenience and necessity include the power to compel, in the absence of an application from the carrier, a route extension of the character involved in the case before us. If the statute does not authorize such an

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extension, the proceeding must be dismissed; if it does, the motion to dismiss must be denied.

We are of the opinion that this section of the Act does authorize the Board to add new points or services to the certificate of a carrier on the Board's own initiative and without an application by, and the consent of, the carrier; but this authority does not include the addition of new service which would be so extensive as to amount to a new air transportation route, or of such a kind as to substantially change the character of a carrier's system.

Section 401(a) of the Act is the keystone of the Act's regulatory plan with respect to the extent of the operations of air carriers. It provides that "no air carrier shall en- [fol. 5-6] gage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such air transportation." Section 401 (f) requires that "Each certificate • • • shall specify the terminal and intermediate points, if any, between which the air carrier is authorized to engage in air transportation" and in the case of a certificate for foreign air transportation provides that a certificate need "designate only the general route or routes to be followed" if the designation of terminal and intermediate points is not practicable.

The fundamental regulatory purpose which certificates of public convenience and necessity serve is to prescribe, and thereby to control, the extent of the air transportation which each particular carrier may carry on. The principal components of a certificate are the terminal and intermediate points and the classes of traffic to be served and, in view of the purposes of the certificate procedure, it is clear that any other terms of a certificate are simply incidental to these major elements. Under these circumstances, the conclusion is inescapable that when section 401 (h) provides that the Board "may alter, amend, [or] modify, • • • any such certificate" it constitutes a grant of power to alter, amend, or modify that which is the significant part of a certificate and which is the basis for the operation of the certificate scheme as a regulatory device, namely, the terminal and intermediate points and classes of traffic authorized to be served. There is nothing in the usual and ordinary meaning of the words of the statutory phrase "may alter, amend, [or] modify any such certificate," which requires, or even justifies a contrary conclusion.

It has been argued that other Federal statutes in the railroad, motor carrier, natural gas, communications and electric power fields show a congressional intent to grant to Federal regulatory agencies a circumscribed and carefully delineated power to compel extensions of public utility services, and that, in the absence of similar language in the Civil Aeronautics Act spelling out the precise power of the Board to compel extensions of airline service, the power granted by section 401 (h) is extremely limited in scope. In our opinion, however, an examination of these statutes reveals that they differ so greatly from the Civil Aeronautics Act in language and purpose, and in the factual situations to which they relate, that their relation to the problem before us is too remote to be significant.

Consideration of the legislative history of the Act is of no assistance in resolving the question. Such material as the parties have presented as significant seems about equally susceptible of being construed as supporting or as denying the existence of the power of extension. It is pointed out, for example, that in several of the aviation bills which were introduced in Congress prior to the final enactment of the Civil Aeronautics Act, provisions were included, in addition to a section similar to the present section 401 (h), which stated that the Board should have power to require an "extension of service." It is argued from this that since such a provision was dropped from [fol. 5-7] the legislation as finally enacted it is indicated that Congress did not intend the Board to have the power to order compulsory extensions of a carrier's route. On the other hand, those opposing the motion in this proceeding take the position that the eventual omission from the Act of this provision of the earlier bills indicates that Congress believed the provision to be unnecessary since section 401 (h) already provided for such a power. The legislative background appears to us to be entirely inconclusive on the point.

References to other provisions of the Act shed little light on the problem. It has been argued in support of the motion that the omission from section 401(h) of the phrase, which appears in section 401(d), that the Board must find a carrier "fit, willing, and able" indicates that an extension of service cannot be authorized under the former section; and that since section 404, providing that "It shall be the duty of every air carrier to provide and furnish interstate

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and overseas air transportation, as authorized by its certificate * * *," does not apply to foreign air transportation, section 401(h) must be construed as not authorizing the Board to compel an extension of service since the Act gives the Board no power to order the rendering of the new service.

Opponents of the motion, on the other hand, contend that the omission of the words "fit, willing, and able" from section 401(h) shows that the power of the Board requiring extensions of service under section 401(h) may be exercised even though the carrier is not "willing" to render the service. It is contended also that the inapplicability of section 404 to foreign air transportation is not material in view of the fact that section 401(k) provides that "no air carrier shall abandon any route, or part thereof, for which a certificate has been issued" unless the Board approves the abandonment—although it is arguable that section 401(g), which provides that the Board shall suspend or revoke a certificate if the service authorized thereby is not inaugurated within 90 days, prescribes the exclusive method of handling a carrier's failure to start a newly authorized service. Parties opposing the motion cite the language of section 401(n) as indicating that the Board's power in section 401(h) to amend a certificate includes the power to provide for additional services. That section, after providing for the certification to the Board by the Postmaster General of the need for additional mail service, states that the Board shall, where required by the public convenience and necessity, "make provision for such additional service * * * by amending an existing certificate or certificates." This point is countered by the argument that the section does not refer to compulsory extensions of service and consequently is of no aid in determining whether section 401(h) provides for compulsion. As in the case of the legislative history, we find no clear indication in the other provisions of the Act as to the Congressional intent concerning the meaning of section 401(h). The provisions of the Act in that respect are inharmonious and any conclusion drawn therefrom must rest at best on a delicate foundation of an extremely involved process of reasoning in order to reconcile the various provisions.

[fol. 5-8] Under such circumstances, the sound approach to the question of statutory construction presented here is to rely upon the usual and ordinary meaning of the statu-

tory language as fully expressing the intent of Congress; by applying that meaning to the language of section 401(h), we find in the section a grant of power to the Board to compel extensions of service. It remains to be determined whether there are limits upon the character or size of the extensions which can be required.

Although the power to alter, amend, and modify certificates of public convenience grants a broad and important power to the Board, it is apparent that the words alter, amend, and modify connote a limited power to change an existing certificate. The power to alter, amend, and modify does not include the power to transform the essential character of the thing being altered, amended, or modified. Thus it was held in *Smith* v. *United States*, 74 F. (2d) 941, 942 (C. C. A. 5th, 1935) that power to alter means power "to change without destroying the identity of the thing changed." In *Interstate Commerce Commission* v. *Oregon-Washington R. R. & Navigation Co.*, 288 U. S. 14 (1933) the Supreme Court held (Justices Cardoza, Stone and Brandeis dissenting) that paragraph (21) of section 1 of the Interstate Commerce Act did not authorize the Interstate Commerce Commission to compel the particular extension of the lines of a railroad presented to the court in that case. The significant point for present purpose, however, is that even the dissenting Justices, who took the position that the extension under consideration was lawful, conceded that the word "extension" used in the statute being construed did not authorize unlimited additions of new services.

While we must find, therefore, that there are limits to the scope of the grant of power in section 401(h), the generality of the statutory language makes it impossible to draw any precise line of demarcation between what is permitted and what is not.

It has been argued that by reason of constitutional limitations section 401(h) must be construed as giving the Board power to compel only those extensions of service which are within the scope of the undertaking of a carrier. Decisions by State and Federal Courts are cited as supporting this view and it is asserted that this principle must have been known to Congress and incorporated by it in the provisions of the Civil Aeronautics Act. While it is true that in a number of opinions the courts have recited as a rule of Constitutional law the principle that a utility cannot be

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compelled to extend its service into territories which it has not undertaken to serve,[4] the courts have not given express [fol. 5-9] recognition to the existence of that principle in all cases. There are cases in which orders compelling extensions of service seem to have been held to be valid simply on a finding by the courts that the order was reasonable.[5] The contrast between the two different expressions of principle involved is brought out forcibly in *Interstate Commerce Commission* v. *Oregon-Washington R. R. & Navigation Co., supra.* While the decision in that case turned upon a question of statutory construction, the majority of the court indicated clearly that it felt that the Constitution would not permit an extension beyond the profession of service of the carrier.

On the other hand, the dissenting opinion expresses the view that:

> "As long as governmental orders are kept within the range of reason, their operation is unaffected by expectation or desire.
>
> "The Fifth Amendment of the Constitution is invoked by the carriers but invoked without avail. Consisently with that Amendment Congress may delegate to the Commission the power to force upon unwilling carriers an extension of their lines into fields of old service and of new. Much of what has been written in this opinion as to the meaning of the statute is pertinent also to an inquiry as to power. Again the

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[4] *Interstate Commerce Commission* v. *Oregon-Washington R. Nav. Co.*, 288 U. S. 14, 77 L. Ed. 588, 53 53 Sup. Ct. 266 (1933); *Atchison, T. & S. F. R. Co.* v. *Railroad Commission*, 173 Cal. 577, 160 Pac. 828 (1916); *Hollywood Chamber of Commerce* v. *Railroad Commission*, 192 Cal. 307, 219 Pac. 983 (1923); *Oklahoma Natural Gas Co.* v. *Corporation Commission*, 88 Okla. 51, 211 Pac. 401 (1922); *Southern Bell Tel. & Tel. Co.* v. *Town of Calhoun*, 287 Fed. 381 (W. D. S. C., 1923).

[5] *New York ex rel. Woodhaven Gas Light Co.* v. *Public Utilities Commission*, 269 U. S. 244, 70 L. Ed. 255, 46 Sup. Ct. 83, (1925); *New York ex rel. New York & Q. G. Co.* v. *McCall*, 245 U. S. 345, 62 L. Ed. 337 (1917); *International Bridge Co.* v. *New York*, 254 U. S. 126, 65 L. Ed. 176 (1920).

> thought is to be kept before us that the need of the public, not the acquiescence of the carrier, is the measure of the service, provided only that for such service there is adequate requital. Whether such requital has been assured is a question not susceptible of answer except in the setting of the circumstances."

We cannot find that the so-called profession of service rule is a sound limitation on the power of extension. A public utility professes to serve in fact only that which it is serving at the time, or in the case of an air carrier only the terminal and intermediate points and classes of traffic currently covered by its certificate. It seems to us, therefore, that the rule is meaningless as a test of the validity of an order compelling the inauguration of a new service; and to give lip-service to the principle would not be consistent with intelligent administration of the Act. Modern concepts of the scope of governmental regulatory power support the soundness of the conclusion of the dissenting Justices in the *Interstate Commerce Commission* v. *Oregon-Washington R. & Navigation Co.* case that the constitutional validity of governmental orders is to be tested by the standard of reasonableness.[6]

[fol. 5-10] While in our opinion neither the Constitution nor the principles of statutory construction restrict the power of the Board under section 401(h) to ordering compulsory extensions which are within the undertaking of the air carrier, nevertheless, as we have pointed out earlier, the controlling statutory words are not unlimited in meaning. We believe that the fair construction of the scope of the terms "alter," "amend," or "modify" can be best expressed in the language used by the dissenting opinion in the Oregon case to define the term "extension":

> "• • • [They do] not fairly connote a prolongation so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal. The action of the Commission must have a basis in reason, and its order must be viewed with reference to the length and other conditions of the line or lines to be enlarged. No doubt there is a point at which

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[6] Nebbia v. New York, 291 U. S. 502, 78 L. Ed. 940 (1934).

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the enlargement of a road becomes 'the construction of a new line' rather than the extension of an old one."

It is on the basis of these principles that we now turn to the consideration of the extension of Panagra's system to a terminal point in the United States.

Since its incorporation in 1929 Panagra's commercial operations at all times have been confined to the transportation of passengers, cargo, and mail between the Canal Zone and points in South America. While a large proportion of its total traffic has consisted of traffic flowing between the United States and South America, that traffic has been moved north of the Canal Zone by other carriers. The extension of Panagra's system referred to in the order instituting the present proceeding would give the carrier direct access to one or more of the major gateways for through traffic between the United States and Latin America. The extension would permit it to connect directly with the domestic air transportation system of the United States, without the necessity of relying upon the connecting services of Pan American and other carriers operating in the foreign field for access to traffic flowing to and from the continental United States. The extension would increase the route mileage of Panagra approximately 1,200 miles, or about 14 per cent of its existing mileage. It is estimated that the extension initially would require an additional capital investment on the part of Panagra of around $800,000 which compares with Pamagra's gross assets at the end of 1942 of $10,700,000 and its net worth, exclusive of goodwill, of over $3,000,000.

In the light of the conditions surrounding the extension here involved we conclude that the requiring of the extension would not be within the power granted the Board by section 401(h) to "alter, amend, [or] modify" Panagra's certificate. The length of the mileage of the new service and the amount of additional investment required to operate it have been factors in reaching this conclusion. However, the principal consideration which influences us is the fact that to extend the Panagra system from the Canal Zone [fol. 5-11] to a point in Florida would constitute a basic transformation of the character of the carrier. Panagra, now a connecting carrier as to through traffic between the United States and South America, would be made a carrier

directly serving that traffic—and serving it moreover in competition with an affiliated company. There is a fundamental difference between the position of a carrier whose routes stop so far short of the continental United States as those of Panagra and which depends upon connecting carriers for access to traffic to and from that area, and a carrier which has direct access to the continental United States over its own system. It does not seem reasonable to believe that Congress contemplated that such a change in the character of a carrier's system should be compelled by Government order. We find, therefore, that the extension of Panagra's route from the Canal Zone to the United States would not be an alteration, amendment, or modification of its certificate within the meaning of section 401(h) of the Act in the sense that the Board could compel such an extension in the absence of an application from Panagra.

Regardless of which of the co-owners of Panagra is at fault, the very fact that a controversy of this kind has developed indicates that an unhealthy condition exists in the internal affairs of the company. A decision by the Board, after consideration on the merits, of the question of whether or not Panagra's routes should be extended to some point or points in the continental limits of the United States would remedy one particular controversy between the co-owners; but it would not solve the basic difficulties of the Panagra joint ownership.

This is an inherently bad situation. Deadlock between the two interests equally represented in the ownership of the company is always possible, and certain to occur from time to time, especially in view of the special interests and the other activities of the two co-owners. We have sought remedy under the Civil Aeronautics Act, but after having the facts presented in extensive public hearings we must conclude that the Act does not give the Board the power to take the action contemplated by this proceeding.

An appropriate order will be entered dismissing the proceeding.

Pogue, Chairman, Warner, Ryan and Lee, Members of the Board, concurred in the above opinion. Branch, Member, did not take part in the decision.

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[fol. 6] EXHIBIT C

UNITED STATES OF AMERICA, CIVIL AERONAUTICS BOARD

Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 5th day of August, 1944.

Docket No. 779

In the matter of the alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.

Order Denying Petition

W. R. Grace & Co. having filed a petition for reargument and reconsideration of the Board's opinion and order Serial Number 2867 dated May 24, 1944, granting the motion of Pan American Airways Corporation to dismiss the above-entitled proceeding for lack of jurisdiction; and

The Board, upon due consideration of all the matters set forth in said petition, finding that the grounds set forth therein are insufficient to justify granting the relief requested;

It is ordered, That said petition of W. R. Grace & Co. be and it is denied.

By the Civil Aeronautics Board: (S.) Fred A. Toombs, Fred A. Toombs, Secretary. (Seal)

[fol. 7] [Endorsed:] No. 19250. In the United States Circuit Court of Appeals for the Second Circuit W. R. Grace & Co., Petitioner, v. Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago and Southern Air Lines, Inc., Taca, S. A., Department of Justice of the United States of America, and Pan American-Grace Airways, Inc., Respondents. Notice of Motion to Dismiss or to Affirm Forthwith. Civil Aeronautics Board, Washington 25, D. C.

[fol. 8] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19520

W. R. GRACE & Co., Petitioner,

v.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO and SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA, and PAN AMERICAN-GRACE AIRWAYS, INC., Respondents.

NOTICE OF JOINDER IN SUPPORT OF MOTION TO DISMISS OR TO AFFIRM

To: Wright, Gordon, Zachry, Parlin & Cahill, Esqs., Attorneys for W. R. Grace & Co., Petitioner, 63 Wall Street, New York 5, New York; Gambell & White, Esqs., Attorneys for Respondent Eastern Air Lines, Inc., Suit 825, The Citizens & Southern National Bank Building, Atlanta 3, Georgia; Denning & Cross, Esqs., Attorneys for Respondent National Airlines, Inc., Investment Building, Washington 5, D. C.; H. R. Bolander, Jr., Esq., Attorney for Respondent Chicago and Southern Air Lines, Inc., Municipal Airport, Memphis 2, Tennessee; Willkie, Owen, Otis, Farr & Gallagher, Esqs., Attorneys for Respondent Taca, S. A., 15 Broad Street, New York; W. F. Cogswell, Esq., 7 Hanover Square, New New York 5, New York; W. F. Cogswell, Esq., 7 Hanover Square, New York 5, New York; and H. Preston Morris, Esq., 135 East 42nd Street, New York 17, New York, Attorneys for Respondent Pan American-Grace Airways, Inc.; Wendell Berge, Esq., Assistant Attorney General, Depart-
[fol. 9] ment of Justice, Washington, D. C.; George C. Neal, Esq., General Counsel, Civil Aeronautics Board, Washington, D.C.

Sirs:

Please take notice that upon the motion of respondent Civil Aeronautics Board, filed February 1, 1945, and upon all the pleadings filed and proceedings hitherto had herein, the undersigned, as attorneys for respondent Pan American Airways Corporation, will join in support of the aforesaid

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motion of respondent, Civil Aeronautics Board, at a Motion Term of this Court, to be held at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on March 12, 1945, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the petition for review herein, or in the alternative, for an order affirming forthwith the orders sought to be reviewed thereby, on the grounds stated in the aforesaid motion.

February 8, 1945.

Root, Clark, Buckner & Ballantine, Attorneys for Pan American Airways Corporation, 31 Nassau Street, New York 5, N. Y.

Henry J. Friendly, Counsel.

[fol. 10] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19520

W. R. GRACE & Co., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago and Southern Air Lines, Inc., TACA, S. A., Department of Justice of the United States of America, and Pan American-Grace Airways, Inc., Respondents.

STATE OF NEW YORK,
County of New York, ss:

Frederick Goldfeder, being duly sworn, deposes and says:

I am over the age of 21 and a clerk in the office of Root, Clark, Buckner & Ballantine, attorneys for Pan American Airways Corporation herein. On the 10th day of February, 1945, I served the annexed notice of joinder on the attorneys whose names are listed below by depositing true copies thereof securely enclosed in postpaid envelopes in a post office box located at 31 Nassau Street, City, County and

State of New York and directed to said attorneys at the addresses listed below their names:

Wright, Gordon, Zachry, Parlin & Cahill, Esqs., 63 Wall Street, New York 5, New York; Gambrell & White, Esqs., Suite 825, The Citizens & Southern National Bank Build-
[fol. 11] ing, Atlanta 3, Georgia; Denning & Cross, Esqs., Investment Building, Washington 5, D. C.; H. R. Bolander, Jr., Esq., Municipal Airport, Memphis 2, Tennessee; Willkie, Owen, Otis, Farr & Gallagher, Esqs., 15 Broad Street, New York 5, New York; W. F. Cogswell, Esq., 7 Hanover Square, New York 5, New York; H. Preston Morris, Esq., 135 East 42nd Street, New York 17, New York; Wendell Berge, Esq., Assistant Attorney General, Department of Justice, Washington, D. C.

Frederick Goldfeder.

Sworn to before me this 13th day of February, 1945.

Norman R. Caridi, Notary Public, Kings County. Kings Co. Clk's. No. 404, Reg. No. 74C5, N. Y. Co. Clk's. No. 329, Reg. No. 186C5. Commission Expires March 30, 1945.

[fol. 12] [Endorsed:] In the United States Circuit Court of Appeals for the Second Circuit. W. R. Grace & Co., Petitioner, v. Civil Aeronautics Board, et als., Respondents. Notice of Joinder in Support of Motion to Dismiss or to Affirm. Root, Clark, Buckner & Ballantine, Attorneys for Pan American Airways Corporation, 31 Nassau Street, Borough of Manhattan, New York City.

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[fol. 13] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of June, one thousand nine hundred and forty-five.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges

W. R. GRACE & Co., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, et al., Respondents

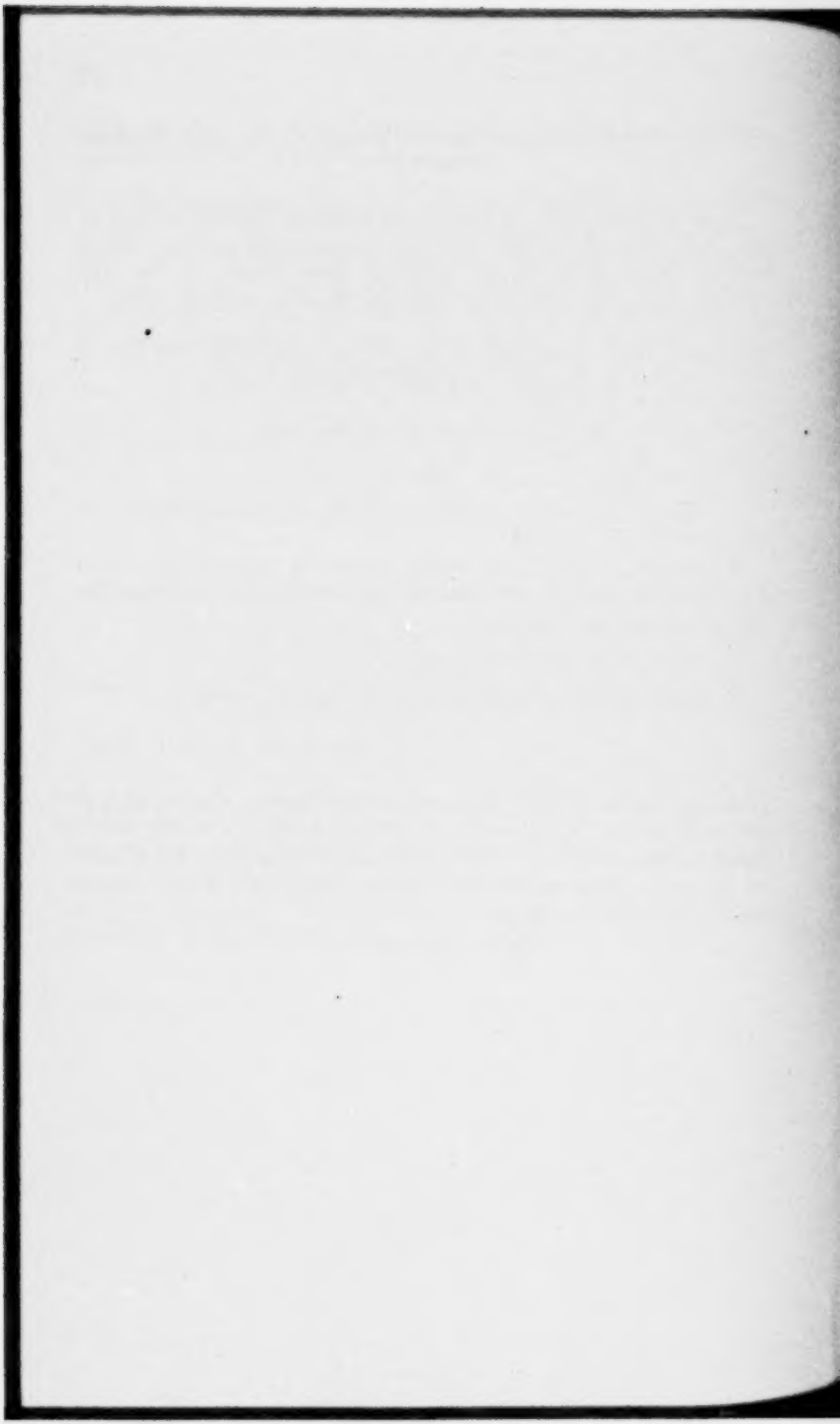
A motion having been made herein by counsel for Civil Aeronautics Board, respondent, to dismiss the petition for review or affirm forthwith,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 14] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. W. R. Grace & Co., v. Civil Aeronautics Board, et al. Order. United States Circuit Court of Appeals: Second Circuit. Filed June 4th, 1945. Alexander M. Bell, Clerk.



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IN THE

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

W. R. GRACE & Co.,
Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,
Respondents.

Statement Under Rule 13(4).

By petition and complaint dated December 16, 1941, W. R. Grace & Co. requested the Civil Aeronautics Board to institute a proceeding, pursuant to Section 401(h) of the Civil Aeronautics Act of 1938, to alter, amend and modify the Certificate of Public Convenience and Necessity of Pan American-Grace Airways Inc. so as to make the northern terminal of its route a point in the United States. This was subsequently assigned the Docket No. 707.

By complaint dated April 29, 1942, W. R. Grace & Co. requested the Board to require Pan American Airways Corporation, pursuant to Section 411 of the Civil Aeronautics Act and Sections 7 and 11 of the Clayton Act, to cease and desist from certain matters in violation of those sections and to divest itself of its ownership of the stock of Pan Ameri-

can-Grace Airways Inc. to the extent necessary to remove its negative control thereof. This was assigned the Docket No. 744.

By order dated September 10, 1942 the Board on its own initiative instituted a proceeding to determine whether the Certificate of Public Convenience and Necessity of Pan American-Grace Airways Inc. should be altered, amended, and modified to authorize and require that the northern terminal of its route be in the United States. This proceeding was given the Docket No. 779. W. R. Grace & Co., Pan American Airways Inc., and Pan American-Grace Airways Inc. were made parties to the proceeding. Subsequently, the Department of Justice, Pan American Airways Corporation, National Airlines Inc., TACA, S.A., Eastern Air Lines Inc. and Chicago and Southern Air Lines Inc. were granted permission to intervene.

By an order dated October 22, 1942, the Board limited the scope of Docket 779 to the consideration of Miami, Tampa and St. Petersburg, Florida as United States terminals for Pan American-Grace Airways Inc.

On October 26, 1942, Pan American Airways Corporation filed in Docket 779 an answer and petition for investigation under Section 415 of the Civil Aeronautics Act.

On June 25, 1943, W. R. Grace & Co. filed in Docket 779 a reply to the answer and petition of Pan American Airways Corporation.

By petition dated September 9, 1943 Eastern Air Lines Inc. requested a consolidation of its application under Docket 782 with Docket 779. That petition was denied by order of the Board dated September 13, 1943.

Docket 779 came on for hearing before Assistant Chief Examiner Frances W. Brown and Examiner Vincent L. Gingerich on September 15, 1943 and continued from day to day until October 23, 1943.

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Statement Under Rule 13(4).

Pan American filed a motion dated September 14, 1943 to dismiss Docket 779 for want of jurisdiction, in which Eastern Air Lines joined. On September 23, 1943 the Board issued its order denying the motion without prejudice to its renewal at the close of the hearing. On October 21, 1943 Eastern Air Lines Inc. and National Airlines, Inc. filed motions to dismiss Docket 779. On October 23, 1943 Pan American renewed its motion to dismiss.

In November 1943 the Board ordered oral argument on the motion of Pan American to dismiss.

On December 2, 1943 W. R. Grace & Co. filed a cross-motion to defer oral argument and decision on Pan American's motion to dismiss until the time assigned for final argument on the merits of the case. By order dated December 17, 1943 the motion of W. R. Grace & Co. was denied.

Briefs on the motion to dismiss were submitted to the Civil Aeronautics Board on January 15, 1944 and oral argument was had on January 31, 1944. By order and opinion dated May 24, 1944, the Board dismissed Docket 779 for lack of jurisdiction.

W. R. Grace & Co. filed a petition for reargument and reconsideration, dated June 22, 1944. This petition was denied by order of the Board dated August 5, 1944.

Petition for review by this Court was filed, dated October 3, 1944. By order entered June 4, 1945 this Court denied a motion of respondent, Civil Aeronautics Board, joined in by Pan American Airways Corporation and Eastern Air Lines, to dismiss the appeal or affirm forthwith.

By order dated July 9, 1945, this Court granted the motion of W. R. Grace & Co. to require the Civil Aeronautics Board to certify as part of the record certain correspondence concerning the scope of the motion and argument, printed *infra*, pages 43-50.

By stipulation filed February 16, 1945, Cahill, Gordon, Zachry & Reindel were substituated as attorneys for petitioner in the place of Wright, Gordon, Zachry, Parlin & Cahill.

10

Order Dismissing Proceeding.

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

At a Session of the Civil Aeronautics Board Held at its Office in Washington, D. C., on the 24th Day of May, 1944.

11

IN THE MATTER of The PANAGRA TERMINAL INVESTIGATION under section 401 of the Civil Aeronautics Act of 1938, as amended.	Docket No. 779.

The Board, acting upon its own initiative, having instituted an investigation to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered,
12 amended and modified to authorize and require that the route of Pan American-Grace Airways, Inc., between Buenos Aires, Argentina, and Cristobal, Canal Zone, be extended to a terminal in the United States at Miami, Tampa, or St. Petersburg, Florida; and

The Board, upon motions to dismiss said proceeding for lack of jurisdiction, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof, and finding its action in this matter is necessary pursuant to said opinion;

IT IS ORDERED, That the proceeding instituted by the Board by its order of September 10, 1942 (Order Serial No.

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1928), as amended by its order of October 22, 1942 (Order Serial No. 1991) be, and the same is dismissed.

By the Civil Aeronautics Board:

/s/ Fred A. Toombs,

Fred A. Toombs,
Secretary.

(Seal)

14

Opinion.

United States of America

CIVIL AERONAUTICS BOARD

Washington, D. C.

Docket No. 779.

Panagra Terminal Investigation

15

Decided: May 24, 1944.

Section 401(h) of the Act authorizes the Board, on its own initiative, to alter, amend, or modify a certificate of public convenience and necessity by including therein new terminal and intermediate points; but that authority does not permit the addition of new service which would be so extensive as to amount to a new air transportation route, or of such a kind as to substantially change the character of a carrier's system.

16 *Opinion.*

The extension of the route of Panagra to a terminal point in Florida would constitute a basic transformation in the character of that carrier's system and, therefore, cannot be ordered by the Board under section 401(h) of the Act.

Proceedings dismissed.

Appearances:

JOHN T. CAHILL and FRED J. KNAUER for W. R. Grace & Co.

17 HENRY J. FRIENDLY and J. P. KRANZ, JR. for Pan American Airways Corporation.

E. SMYTHE GAMBRELL and W. GLEN HARLAN for Eastern Air Lines, Inc.

WILLIAM I. DENNING and COATES LEAR for National Airlines, Inc.

H. R. BOLANDER, JR. for Chicago and Southern Air Lines, Inc.

JOHN H. WANNER, H. DON REYNOLDS, and MELVIN S. COHEN for the Civil Aeronautics Board.

18 BY THE BOARD:

This proceeding comes before us at this time on a motion to dismiss which challenges the Board's jurisdiction.

Before proceeding to a determination of the principal issue presented to the Board at the present stage of this case, it is necessary to review briefly the circumstances which gave rise to the proceeding. Pan American-Grace Airways, Inc., hereinafter referred to as Panagra, was incorporated in 1929 by its present co-owners Pan American Airways Corporation and W. R. Grace & Co., hereinafter referred to as Grace, each of which purchased, and has at all times since then owned, 50 per cent of Panagra's outstanding capital stock. Shortly after its incorporation,

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Panagra secured a mail contract with the Postmaster General for the transportation of mail between the Canal Zone and Buenos Aires, Argentina, via various points on the west coast of South America. Operations under the contract were commenced on May 17, 1929, between the Canal Zone and Mollendo, Peru, and were extended to Buenos Aires on or about October 12, 1929. Since that date, Panagra has transported persons, property, and mail on its entire route between the Canal Zone and Buenos Aires. From time to time additional points and local services have been added to the route, so that at the present time its system comprises approximately 8,800 route miles.

Pan American Airways, Inc., a wholly-owned subsidiary of Pan American Airways Corporation, has operated international air transportation services since 1927. Since November 1931, it has operated an air transportation service between Miami, Florida, and Buenos Aires by way of points in the Caribbean and on the east coast of South America. In addition to that service, and others, Pan American Airways, Inc., has operated services between Miami and the Canal Zone and between Brownsville, Texas, and the Canal Zone, making connections at the Canal Zone with the services of Panagra.

The route between Miami and Buenos Aires via the Canal Zone and Panagra's west coast route is shorter than the route of Pan American Airways, Inc., between Miami and Buenos Aires via east coast points and the so-called Brazilian cut-off. At no time has Panagra operated regular air transportation service north of the Canal Zone. Although traffic between the United States and points on the west coast of South America and Buenos Aires constitutes a large and important share of Panagra's total business, this traffic has been carried between the United States and the Canal Zone by other carriers, largely by Pan American Airways, Inc., and at that point delivered to or received from Panagra for onward transportation. Most of the business interchanged by Pan American and Panagra at

the Canal Zone is carried over Pan American's Miami-Canal Zone route, and originates in or is destined to the eastern seaboard of the United States. Other important contributions to Panagra's traffic flow are made to or from the Canal Zone through the Brownsville gateway, and through the Los Angeles gateway served by Pan American's subsidiary Companía Mexicana, S. A. Some traffic originating on or destined for the north coast of South America is also interchanged with Panagra at the Canal Zone. In addition, Pan American Airways, Inc., has recently been
23 authorized to serve New Orleans, and its New Orleans-Canal Zone service via Central America will enable traffic to be interchanged with Panagra at the Canal Zone.

The New Orleans-Canal Zone route was granted to Pan American by the Board on February 26, 1943, for a three year period.[1] The record in the present proceeding shows that prior to the hearings in the New Orleans case the Grace representatives on the Board of Directors of Panagra urged that Panagra should apply for a route between the Canal Zone and New Orleans. This proposal was not acceptable to the Pan American representatives on the Panagra Board. Since Pan American and Grace held equal stock ownership and representation on the Panagra Board, the proposal of
24 the Grace representatives failed for lack of a majority.

When efforts to secure the filing of an application by Panagra failed, Grace filed, on May 3, 1941, a petition for leave to intervene in the New Orleans case alleging that since Panagra was not filing an application Grace proposed to file an application in its own behalf for a certificate for a route between the United States and the Canal Zone. Grace was granted leave to intervene, but did not file an application for a certificate during the time that case was pending.

On December 16, 1941, Grace filed a petition and complaint, Docket No. 707, requesting the Board to institute

[1] Pan American Airways, Inc., *et al.*—Service from New Orleans to Cuba and Central America, 4 C. A. B. , decided February 26, 1943.

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a proceeding pursuant to section 401(h) of the Act to alter, amend, and modify Panagra's certificate of public convenience and necessity so as to make the northern terminal of its route a point in the United States such as Miami or Tampa, Florida, or New Orleans, Louisiana. On April 29, 1942, Grace filed a second complaint, Docket No. 744, requesting the Board to require Pan American Airways Corporation, pursuant to section 411 of the Act and sections 7 and 11 of the Clayton Act, to cease and desist from certain matters alleged by Grace to be in violation of those sections, and to divest itself of its ownership of the stock of Panagra to the extent necessary to divest itself of its present negative control of Panagra; and also renewing its request in Docket No. 707.

No formal steps were taken by the Board in connection with the Grace petitions in Dockets Nos. 707 and 744 until September 1942. During this period all action in the New Orleans case also was postponed under the Board's policy, announced December 12, 1941, of suspending further action in all proceedings pending before it under sections 401(d) and 401(h) of the Act "in order that the immediate and maximum attention of air carriers and their personnel, and that of the Civil Aeronautics Board, as well as other Government agencies concerned, may be available for the most efficient discharge of the emergency demands" arising out of the war.

However, the Board did explore the possibility of working out a voluntary settlement of the controversy between Pan American and Grace. Numerous conferences were held by the Board with both parties. Finally, the Board suggested that the parties enter into an agreement under which sufficient shares of the two stockholders would be transferred to an independent public voting trustee or trustees to permit the election to the Panagra Board of an independent director or directors, or under which such an independent public director or directors might be otherwise appointed, who would be able to break the deadlock result-

ing from the equal division of the ownership of Panagra stock between Pan American and Grace. After it became apparent that no satisfactory voluntary arrangement could be mutually agreed upon by the parties and that all efforts to mediate the differences between them would be unsuccessful, the Board, on September 10, 1942, issued its order (Serial No. 1928),[2] as amended by its order of October 22, 1942 (Serial No. 1991)[3] instituting the present proceeding.

The proceeding was instituted by the Board pursuant to section 401(h) of the Act, which provides in part as follows:

29 "(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate [of public convenience and necessity], in whole or in part, if the public convenience and necessity so require, * * *."

The orders provide that it is the purpose of the proceeding to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require that Panagra's route between
30 Buenos Aires, Argentina, and Cristobal, Canal Zone, be extended to a terminal in the United States at Miami, Tampa, or St. Petersburg, Florida. Grace, Pan American Airways, Inc., and Panagra, were made parties to the proceeding, and subsequently the Department of Justice, Pan

[2] "A proceeding is hereby instituted by the Board to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United State at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event a terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States."

[3] "Paragraph 1(a) of the aforesaid order of the Board dated September 10, 1942 (Order Serial No. 1928) be and it is amended by striking out the words 'Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California', and inserting in lieu thereof the words 'Miami, Tampa, or St. Petersburg, Florida.'"

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American Airways Corporation, National Airlines, Inc., TACA, S. A., Eastern Air Lines, Inc., and Chicago and Southern Air Lines, Inc., were granted permission to intervene. 31

Hearings in the proceeding began on September 15, 1943. On the same day Pan American Airways Corporation filed with the Board a motion to dismiss the proceeding for want of jurisdiction, which was denied by the Board on September 23, 1943, without prejudice to its renewal at the close of the hearing. Hearings were then completed and Pan American renewed its motion, in which it was joined by Eastern Air Lines and National Airlines. Briefs in support of, and in opposition to, the motion were submitted on January 15, 1944, and oral argument on the motion was heard by the Board on January 31, 1944. 32

The motion to dismiss asserts that the Board is without power, under the provisions of the Act, to order an extension of Panagra's route from the Canal Zone to Florida. It is contended that section 401(h) does not grant the Board power to extend the route of an air carrier and, in the alternative, that even though such power is granted, the Board cannot compel the carrier to extend its lines into a territory not previously served by that carrier.

The question presented to us by the motion is one of statutory construction; namely, does the power of the Board under section 401(h) to "alter", "amend", and "modify" a certificate of public convenience and necessity include the power to compel, in the absence of an application from the carrier, a route extension of the character involved in the case before us. If the statute does not authorize such an extension, the proceeding must be dismissed; if it does, the motion to dismiss must be denied. 33

We are of the opinion that this section of the Act does authorize the Board to add new points or services to the certificate of a carrier on the Board's own initiative and without an application by, and the consent of, the carrier; but this authority does not include the addition of new ser-

vice which would be so extensive as to amount to a new air transportation route, or of such a kind as to substantially change the character of a carrier's system.

Section 401(a) of the Act is the keystone of the Act's regulatory plan with respect to the extent of the operations of air carriers. It provides that "no air carrier shall engage in any air transportation unless there in in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such air transportation." Section 401(f) requires that "Each certificate * * * shall specify the
35 terminal and intermediate points, if any, between which the air carrier is authorized to engage in air transportation" and in the case of a certificate for foreign air transportation provides that a certificate need "designate only the general route or routes to be followed" if the designation of terminal and intermediate points is not practicable.

The fundamental regulatory purpose which certificates of public convenience and necessity serve is to prescribe, and thereby to control, the extent of the air transportation which each particular carrier may carry on. The principal components of a certificate are the terminal and intermediate points and the classes of traffic to be served and, in view of the purposes of the certificate procedure, it is clear
36 that any other terms of a certificate are simply incidental to these major elements. Under these circumstances, the conclusion is inescapable that when section 401(h) provides that the Board "may alter, amend, [or] modify, * * * any such certificate" it constitutes a grant of power to alter, amend, or modify that which is the significant part of a certificate and which is the basis for the operation of the certificate scheme as a regulatory device, namely, the terminal and intermediate points and classes of traffic authorized to be served. There is nothing in the usual and ordinary meaning of the words of the statutory phrase "may alter, amend, [or] modify any such certificate", which requires, or even justifies, a contrary conclusion.

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It has been argued that other Federal statutes in the railroad, motor carrier, natural gas, communications and electric power fields show a congressional intent to grant to Federal regulatory agencies a circumscribed and carefully delineated power to compel extensions of public utility services, and that, in the absence of similar language in the Civil Aeronautics Act spelling out the precise power of the Board to compel extensions of airline service, the power granted by section 401(h) is extremely limited in scope. In our opinion, however, an examination of these statutes reveals that they differ so greatly from the Civil Aeronautics Act in language and purpose, and in the factual situations to which they relate, that their relation to the problem before us is too remote to be significant.

38

Consideration of the legislative history of the Act is of no assistance in resolving the question. Such material as the parties have presented as significant seems about equally susceptible of being construed as supporting or as denying the existence of the power of extension. It is pointed out, for example, that in several of the aviation bills which were introduced in Congress prior to the final enactment of the Civil Aeronautics Act, provisions were included, in addition to a section similar to the present section 401(h), which stated that the Board should have power to require an "extension of service". It is argued from this that since such a provision was dropped from the legislation as finally enacted it is indicated that Congress did not intend the Board to have the power to order compulsory extensions of a carrier's route. On the other hand, those opposing the motion in this proceeding take the position that the eventual omission from the Act of this provision of the earlier bills indicates that Congress believed the provision to be unnecessary since section 401(h) already provided for such a power. The legislative background appears to us to be entirely inconclusive on the point.

39

References to other provisions of the Act shed little light on the problem. It has been argued in support of the

motion that the omission from section 401(h) of the phrase, which appears in section 401(d), that the Board must find a carrier "fit, willing, and able" indicates that an extension of service cannot be authorized under the former section; and that since section 404, providing that "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate * * *," does not apply to foreign air transportation, section 401(h) must be construed as not authorizing the Board to compel an extension of service since the Act gives
41 the Board no power to order the rendering of the new service.

Opponents of the motion, on the other hand, contend that the omission of the words "fit, willing, and able" from section 401(h) shows that the power of the Board requiring extensions of service under section 401(h) may be exercised even though the carrier is not "willing" to render the service. It is contended also that the inapplicability of section 404 to foreign air transportation is not material in view of the fact that section 401(k) provides that "no air carrier shall abandon any route, or part thereof, for which a certificate has been issued" unless the Board approves the abandonment—although it is arguable that section 401(g),
42 which provides that the Board shall suspend or revoke a certificate if the service authorized thereby is not inaugurated within 90 days, prescribes the exclusive method of handling a carrier's failure to start a newly authorized service. Parties opposing the motion cite the language of section 401(n) as indicating that the Board's power in section 401(h) to amend a certificate includes the power to provide for additional services. That section, after providing for the certification to the Board by the Postmaster General of the need for additional mail service, states that the Board shall, where required by the public convenience and necessity, "make provision for such additional service * * * by amending an existing certificate or certificates." This point is countered by the argument that the section

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does not refer to compulsory extensions of service and consequently is of no aid in determining whether section 401(h) provides for compulsion. As in the case of the legislative history, we find no clear indication in the other provisions of the Act as to the Congressional intent concerning the meaning of section 401(h). The provisions of the Act in that respect are inharmonious and any conclusion drawn therefrom must rest at best on a delicate foundation of an extremely involved process of reasoning in order to reconcile the various provisions.

Under such circumstances, the sound approach to the 44
question of statutory construction presented here is to rely upon the usual and ordinary meaning of the statutory language as fully expressing the intent of Congress; by applying that meaning to the language of section 401(h), we find in the section a grant of power to the Board to compel extensions of service. It remains to be determined whether there are limits upon the character or size of the extensions which can be required.

Although the power to alter, amend, and modify certificates of public convenience grants a broad and important power to the Board, it is apparent that the words alter, amend, and modify connote a limited power to change an existing certificate. The power to alter, amend, and modify 45
does not include the power to transform the essential character of the thing being altered, amended, or modified. Thus it was held in *Smith* v. *United States*, 74 F. (2d) 941, 942 (C. C. A. 5th, 1935) that power to alter means power "to change without destroying the identity of the thing changed." In *Interstate Commerce Commission* v. *Oregon-Washington R. R. & Navigation Co.*, 288 U. S. 14 (1933) the Supreme Court held (Justices Cardozo, Stone and Brandeis dissenting) that paragraph (21) of section 1 of the Interstate Commerce Act did not authorize the Interstate Commerce Commission to compel the particular extension of the lines of a railroad presented to the court in that case. The significant point for present purpose, how-

ever, is that even the dissenting Justices, who took the position that the extension under consideration was lawful, conceded that the word "extension" used in the statute being construed did not authorize unlimited additions of new services.

While we must find, therefore, that there are limits to the scope of the grant of power in section 401(h), the generality of the statutory language makes it impossible to draw any precise line of demarcation between what is permitted and what is not.

47 It has been argued that by reason of constitutional limitations section 401(h) must be construed as giving the Board power to compel only those extensions of service which are within the scope of the undertaking of a carrier. Decisions by State and Federal Courts are cited as supporting this view and it is asserted that this principle must have been known to Congress and incorporated by it in the provisions of the Civil Aeronautics Act. While it is true that in a number of opinions the courts have recited as a rule of Constitutional law the principle that a utility cannot be compelled to extend its service into territories which it has not undertaken to serve,[4] the courts have not given express recognition to the existence of that principle in all

48 cases. There are cases in which orders compelling extensions of service seem to have been held to be valid simply on a finding by the courts that the order was reasonable.[5] The contrast between the two different expressions of principle involved is brought out forcibly in *Interstate Commerce Commission* v. *Oregon-Washington R. R. & Navigation Co.*,

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[4] *Interstate Commerce Commission* v. *Oregon-Washington R. Nav. Co.*, 288 U. S. 14, 77 L. Ed. 588, 53 Sup. Ct. 266 (1933); *Atchison, T. & S. F. R. Co.* v. *Railroad Commission*, 173 Cal. 577, 160 Pac. 828 (1916); *Hollywood Chamber of Commerce* v. *Railroad Commission*, 192 Cal. 307, 219 Pac. 983 (1923); *Oklahoma Natural Gas Co.* v. *Corporation Commission*, 88 Okla. 51, 211 Pac. 401 (1922); *Southern Bell Tel. & Tel. Co.* v. *Town of Calhoun*, 287 Fed. 381 (W. D. S. C., 1923).

[5] *New York ex rel. Woodhaven Gas Light Co.* v. *Public Utilities Commission*, 269 U. S. 244, 70 L. Ed. 255, 46 Sup. Ct. 83, (1925); *New York ex rel. New York & Q. G. Co.* v. *McCall*, 245 U. S. 345, 62 L. Ed. 337 (1917); *International Bridge Co.* v. *New York*, 254 U. S. 126, 65 L. Ed. 176 (1920).

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supra. While the decision in that case turned upon a question of statutory construction, the majority of the court indicated clearly that it felt that the Constitution would not permit an extension beyond the profession of service of the carrier.

On the other hand, the dissenting opinion expresses the view that:

> "As long as governmental orders are kept within the range of reason, their operation is unaffected by expectation or desire.
>
> "The Fifth Amendment of the Constitution is invoked by the carriers but invoked without avail. Consistently with that Amendment Congress may delegate to the Commission the power to force upon unwilling carriers an extension of their lines into fields of old service and of new. Much of what has been written in this opinion as to the meaning of the statute is pertinent also to an inquiry as to power. Again the thought is to be kept before us that the need of the public, not the acquiescence of the carrier, is the measure of the service, provided only that for such service there is adequate requital. Whether such requital has been assured is a question not susceptible of answer except in the setting of the circumstances."

50

51

We cannot find that the so-called profession of service rule is a sound limitation on the power of extension. A public utility professes to serve in fact only that which it is serving at the time, or in the case of an air carrier only the terminal and intermediate points and classes of traffic currently covered by its certificate. It seems to us, therefore, that the rule is meaningless as a test of the validity of an order compelling the inauguration of a new service; and to give lip-service to the principle would not be consistent with intelligent administration of the Act. Modern con-

cepts of the scope of governmental regulatory power support the soundness of the conclusion of the dissenting Justices in the *Interstate Commerce Commission* v. *Oregon-Washington R. & Navigation Co.* case that the constitutional validity of governmental orders is to be tested by the standard of reasonableness.[6]

While in our opinion neither the Constitution nor the principles of statutory construction restrict the power of the Board under section 401(h) to ordering compulsory extensions which are within the undertaking of the air carrier, nevertheless, as we have pointed out earlier, the con-
53 trolling statutory words are not unlimited in meaning. We believe that the fair construction of the scope of the terms "alter", "amend", or "modify" can be best expressed in the language used by the dissenting opinion in the Oregon case to define the term "extension":

> "• • • [They do] not fairly connote a prolongation so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal. The action of the Commission must have a basis in reason, and its order must be viewed with
> 54 reference to the length and other conditions of the line or lines to be enlarged. No doubt there is a point at which the enlargement of a road becomes 'the construction of a new line' rather than the extension of an old one."

It is on the basis of these principles that we now turn to the consideration of the extension of Panagra's system to a terminal point in the United States.

Since its incorporation in 1929 Panagra's commercial operations at all times have been confined to the transportation of passengers, cargo, and mail between the Canal Zone and points in South America. While a large propor-

[6] *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940 (1934).

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tion of its total traffic has consisted of traffic flowing between the United States and South America, that traffic has been moved north of the Canal Zone by other carriers. The extension of Panagra's system referred to in the order instituting the present proceeding would give the carrier direct access to one or more of the major gateways for through traffic between the United States and Latin America. The extension would permit it to connect directly with the domestic air transportation system of the United States, without the necessity of relying upon the connecting services of Pan American and other carriers operating in the 56
foreign field for access to traffic flowing to and from the continental United States. The extension would increase the route mileage of Panagra approximately 1,200 miles, or about 14 per cent of its existing mileage. It is estimated that the extension initially would require an additional capital investment on the part of Panagra of around $800,000 which compares with Panagra's gross assets at the end of 1942 of $10,700,000 and its net worth, exclusive of goodwill, of over $3,000,000.

In the light of the conditions surrounding the extension here involved we conclude that the requiring of the extension would not be within the power granted the Board by 57
section 401(h) to "alter, amend, [or] modify" Panagra's certificate. The length of the mileage of the new service and the amount of additional investment required to operate it have been factors in reaching this conclusion. However, the principal consideration which influences us is the fact that to extend the Panagra system from the Canal Zone to a point in Florida would constitute a basic transformation of the character of the carrier. Panagra, now a connecting carrier as to through traffic between the United States and South America, would be made a carrier directly serving that traffic—and serving it moreover in competition with an affiliated company. There is a fundamental difference between the position of a carrier whose routes stop so far short of the continental United States as those of

Panagra and which depends upon connecting carriers for access to traffic to and from that area, and a carrier which has direct access to the continental United States over its own system. It does not seem reasonable to believe that Congress contemplated that such a change in the character of a carrier's system should be compelled by Government order. We find, therefore, that the extension of Panagra's route from the Canal Zone to the United States would not be an alteration, amendment, or modification of its certificate within the meaning of section 401(h) of the Act in the
59 sense that the Board could compel such an extension in the absence of an application from Panagra.

Regardless of which of the co-owners of Panagra is at fault, the very fact that a controversy of this kind has developed indicates that an unhealthy condition exists in the internal affairs of the company. A decision by the Board, after consideration on the merits, of the question of whether or not Panagra's routes should be extended to some point or points in the continental limits of the United States would remedy one particular controversy between the co-owners; but it would not solve the basic difficulties of the Panagra joint ownership.

60 This is an inherently bad situation. Deadlock between the two interests equally represented in the ownership of the company is always possible, and certain to occur from time to time, especially in view of the special interests and the other activities of the two co-owners. We have sought remedy under the Civil Aeronautics Act, but after having the facts presented in extensive public hearings we must conclude that the Act does not give the Board the power to take the action contemplated by this proceeding.

An appropriate order will be entered dismissing the proceeding.

Pogue, Chairman, Warner, Ryan and Lee, Members of the Board, concurred in the above opinion. Branch, Member, did not take part in the decision.

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Order Denying Reargument and Reconsideration.

61

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.
Adopted by the Civil Aeronautics Board
at its Office in Washington, D. C.,
on the 5th Day of August, 1944.

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

62

W. R. Grace & Co. having filed a petition for reargument and reconsideration of the Board's opinion and order Serial Number 2867 dated May 24, 1944, granting the motion of Pan American Airways Corporation to dismiss the above-entitled proceeding for lack of jurisdiction; and 63

The Board, upon due consideration of all the matters set forth in said petition, finding that the grounds set forth therein are insufficient to justify granting the relief requested;

IT IS ORDERED, That said petition of W. R. Grace & Co. be and it is denied.

By the Civil Aeronautics Board:

/s/ FRED A. TOOMBS,

(SEAL)

FRED A. TOOMBS,
Secretary.

64 **Order Denying Cross Motion.**

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.
Adopted by the Civil Aeronautics Board at its Office in Washington, D. C., on the 17th Day of December, 1943.

IN THE MATTER *of* The alteration, amendment, and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

65

66 W. R. Grace and Company, having filed a motion on December 3, 1943, requesting the Board to defer oral argument on and consideration of the motion of Pan American Airways Corporation to dismiss the above-entitled proceeding for want of jurisdiction until the final argument upon the merits, subsequent to the filing of the examiner's report; and

The Board finding, upon due consideration of all matters set forth in the said motion, that W. R. Grace and Company sets forth insufficient grounds for the relief requested:

IT IS ORDERED That the said motion be and it is denied.

By the Civil Aeronautics Board:

/s/ FRED A. TOOMBS,

(SEAL) FRED A. TOOMBS,
Secretary.

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67

Order Instituting Proceeding.

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

At a session of the Civil Aeronautics Board
held at its office in Washington, D. C.
on the 10th day of September, 1942

68

IN THE MATTER
of

The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.

Docket No. 779.

69

It appearing to the Board:

1. That W. R. Grace &Co. (hereinafter called "Grace") and Pan American Airways Corporation each own 50 per cent of the stock of Pan American-Grace Airways, Inc. (hereinafter called "Panagra"); and

2. That Grace has filed with the Board a petition (Docket No. 707) for the alteration, amendment and modification of the certificate of public convenience and necessity of Panagra pursuant to section 401(h) of the Civil Aeronautics Act of 1938, as amended, so as to name a point within the United States as a terminal of Panagra's route; and

3. That Grace alleges in said petition that Panagra's primary function is to provide air transportation over its

route for passengers, property, and mail between the United States and the west coast of South America; that at the present time Panagra is dependent on Pan American Airways, Inc. (hereinafter called "Pan American"), a wholly owned subsidiary of Pan American Airways Corporation, for connecting service between the United States and the Canal Zone; and that such connecting service has been unsatisfactory for the reasons alleged in said petition; and

71 4. That unsatisfactory connecting service, if such exists, may result in air transportation service to the public between the United States and the west coast of South America which is inadequate and deficient as to both quality and quantity, and may also result in retarding the proper and sound development of air transportation service between the United States and the west coast of South America; and that such results would not be in the public convenience and necessity or in the public interest as defined in section 2 of said Civil Aeronautics Act of 1938, as amended; and

72 5. That Pan American is the only air carrier authorized at the present time to engage in air transportation between the United States and South America, and that an additional service by another air carrier may provide competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; and

6. That Grace in its petition, Docket No. 744, alleges that Panagra, because of the opposition of its 50 per cent stockholder, Pan American Airways Corporation, is not authorized by its Board of Directors and stockholders to make application to this Board for the amendment of its certificate of public convenience and necessity so as to provide for said terminal in the United States; and

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Order Instituting Proceeding. 73

The Board finding that its action herein is necessary in order to carry out the provisions of, and to exercise and perform its duties under the Civil Aeronautics Act of 1938, as amended, and acting upon its own initiative and pursuant to the powers and duties vested in it under Titles II, IV, and X of the Civil Aeronautics Act of 1938, as amended, particularly section 401(h) thereof;

It is Ordered:

1. That a proceeding is hereby instituted by the Board to determine whether the public convenience and necessity 74 require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event a terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States; and

2. That Panagra, Grace, and Pan American are made 75 parties to this proceeding; and

3. That this proceeding be assigned for public hearing before an examiner of the Board at a time and place hereafter to be designated.

By the Civil Aeronautics Board:

/s/ Darwin Charles Brown,

Darwin Charles Brown,
Secretary.

(Seal)

76

Order Amending Order Instituting Proceeding.

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 22nd day of October, 1942

77

IN THE MATTER *of* The alteration, amendment, and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

78

The Board, by its order of September 10, 1942 (Order Serial No. 1928), having instituted a proceeding (Docket No. 779) to determine whether the public convenience and necessity require that the certificate of public convenience and necessity issued to Pan American-Grace Airways, Inc. (hereinafter called "Panagra") should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event that a terminal or terminals in the United States are authorized and required pursuant to said proceeding, that Panagra serve one or

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more intermediate points between the Canal Zone and said terminal or terminals in the United States; and

IT APPEARING TO THE BOARD, upon further consideration of said matter:

1. That the greatest volume of traffic moving between the United States and the Canal Zone and the west coast of South America originates in or is destined to that portion of the United States lying east of the Mississippi river;

2. That the extension of Panagra's route to Miami, 80
Tampa, or St. Petersburg, Florida, would require the addition of less mileage to Panagra's route than would the extension of said route to New Orleans, Brownsville, El Paso, or Los Angeles;

3. That the elimination of Los Angeles, El Paso, Brownsville, and New Orleans, from consideration as terminals of said route will simplify the issues and expedite final determination of the proceeding in said Docket No. 779; and

The Board finding that its action is necessary in order to carry out the provisions of and to exercise its powers and perform its duties under Titles II, IV, and X of the Civil 81
Aeronautics Act of 1938, as amended, and particularly sections 205(a) and 401(h) thereof;

IT IS ORDERED:

1. That paragraph 1(a) of the aforesaid order of the Board dated September 10, 1942 (Order Serial No. 1928) be and it is amended by striking out the words "Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California", and inserting in lieu thereof the words "Miami, Tampa, or St. Petersburg, Florida";

82 *Order Amending Order Instituting Proceeding.*

2. That all requests and motions for consolidation of other applications and dockets with this proceeding are hereby denied;

3. That motions for leave to intervene in this proceeding shall be filed with the Board within 10 days after the date of adoption of this order by the Board.

By the Civil Aeronautics Board:

/s/ DARWIN CHARLES BROWN,

83

DARWIN CHARLES BROWN,
Secretary.

(SEAL)

84

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85

Motion of Pan American Airways Corporation to Dismiss for Want of Jurisdiction.

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

86

Communications with respect to this motion should be addressed to

87

ROOT, CLARK, BUCKNER & BALLANTINE,
Attorneys for Pan American Airways Corporation,
31 Nassau Street,
New York 5, N. Y.

HENRY J. FRIENDLY,
CHARLES C. MACLEAN, JR.,
J. P. KRANZ, JR.,
J. H. HAMSTRA,
Of Counsel.

88 *Motion of Pan American Airways Corporation to Dismiss for Want of Jurisdiction.*

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of 89 PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

Now comes your petitioner, Pan American Airways Corporation, a corporation organized and existing under the laws of the State of Delaware, and moves that the Board dis-
90 miss this proceeding for want of jurisdiction, and for grounds of such motion represents as follows:

I.

THE STATUS OF THE PETITIONER TO MAKE THIS MOTION.

Your petitioner is, and since the organization of Pan American Grace Airways, Inc. has been, the owner of half of the capital stock of said Pan American-Grace Airways, Inc. By petition dated September 23, 1942, your petitioner sought leave to intervene and become a party to this proceeding, without prejudice to any position which it might be advised to take as to the legal power of the Board to alter, amend or modify the certificate of Pan American-

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91

Grace Airways, Inc. as proposed in the order of the Board initiating this proceeding or as to the jurisdiction of the Board. Said petition was granted by Order Serial Number 2030, dated November 12, 1942. Petitioner's appearance in this proceeding and this motion are subject to the same conditions stated in said petition.

II.

THE BOARD IS WITHOUT JURISDICTION IN THIS PROCEEDING.

92

Petitioner moves that the Board dismiss this proceeding on the ground that, for the reasons hereinafter set forth, the Board does not have the legal power to order Pan American-Grace Airways, Inc. to operate to a terminal in the United States, as proposed in the Board's order initiating this proceeding, and that the Board is without jurisdiction herein:

1. Pan American-Grace Airways, Inc. was formed pursuant to an agreement dated August 31, 1928, between your petitioner and W. R. Grace & Co. "for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chile." That the scope of the venture was so understood by W. R. Grace & Co. appears from the minutes of the Board of Directors of W. R. Grace & Co. held on February 20, 1929, submitted in this proceeding, which recite that "a proposal was submitted to create and establish a permanent air service from Panama to Valparaiso • • •." For many years Pan American-Grace Airways, Inc. has operated an airline from the Canal Zone along the west coast of south America. It holds a certificate for such operation.

93

2. The minutes of the Board of Directors of Pan American-Grace Airways, Inc., submitted in this proceeding, show

94 *Motion of Pan American Airways Corporation to Dismiss for Want of Jurisdiction.*

that the Board of Directors has never authorized the filing of an application by Pan American-Grace Airways, Inc., to operate north of the Canal Zone and that a resolution to that end failed of passage, the directors being evenly divided.

3. The Civil Aeronautics Act admittedly contains no provision *expressly* empowering the Board to require an air carrier to extend its lines.

95 4. The Board's asserted jurisdiction to take the action proposed in this proceeding must rest upon section 401(h) of the Act, which provides as follows:

> "(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate:
> 96 *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

5. When the provisions of section 401(h) are read in their context, it becomes clear that the grant of power

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therein to "alter, amend, modify or suspend any such certificate" was in no way intended to authorize the Board to require a carrier to operate in a different territory from that specified in its certificate. Had Congress supposed that section 401(h) permitted this, it would certainly have required the Board to find that the carrier was fit and able to operate under such an amended certificate, and would also have inserted provisions to protect the carrier against impairment of its capital similar to those in Section 1(21) of the Interstate Commerce Act. 98

6. These general "amendment" provisions in section 401(h) are wholly insufficient as a foundation for an order such as that here proposed, requiring a carrier to extend its operations over a new route 1,200 miles long, through an area which the carrier has never previously served. The power to compel private property to be devoted to a new use without the assent of its owner, is so extraordinary that it cannot be rested upon mere implication.

7. The absence of express authority in the Civil Aeronautics Act to require an air carrier to extend its operations cannot be dismissed as accidental. In the Transportation Act, 1920, Congress had specifically vested such power with respect to railroads in the Interstate Commerce Commission, providing, in paragraph (21) of section 1, as follows: 99

> "(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in

100 *Motion of Pan American Airways Corporation to Dismiss for Want of Jurisdiction.*

> the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

Bills for the regulation of air transportation, preceding the Civil Aeronautics Act, had contained similar provisions. Thus S. 3187 (73d Congress), introduced by Senator McCarran on March 26, 1934, contained a provision in section 13(d) conferring the power of compulsory extension in
101 phraseology substantially identical with that of section 1(21) of the Interstate Commerce Act. Similar provisions granting the power of compulsory extension were contained in section 16(d) of S. 1332 (74th Congress) introduced by Senator McCarran on January 22, 1935, and in section 301(9) of H. R. 5174 (74th Congress), introduced by Representative Lea on January 31, 1935. On the other hand, the Motor Carrier Act, 1935, enacted on August 9, 1935, contained no compulsory extension provision. The Civil Aeronautics Act followed that pattern.

8. The absence of provision for compulsory extension
102 from the Civil Aeronautics Act, in the face of such provisions in parallel legislation and in predecessor bills of the Act itself, should be conclusive against the existence of such power *in any case*. In this case, however, there is an additional factor, namely, the rule that a statute must be interpreted so as to avoid constitutional doubts. While an agency of Congress cannot declare a statute unconstitutional, nevertheless such an agency *in applying a statute* must heed this canon of construction. The Supreme Court has held that, under this canon, even the *express* compulsory extension provisions of section 1(21) of the Interstate Commerce Act must be limited to extensions *within the carrier's undertaking to serve*, and cannot be applied so as to require a railroad to extend 185 miles into a territory not thereto-

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fore served, the Court saying (*Interstate Commerce Commission* v. *Oregon-Washington Railroad and Navigation Co.*, 288 U. S. 14, 40 (1933)):

> "Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. The views advanced by the appellants to say the least raise serious questions in this respect. The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation. The Transportation Act has not abolished this proprietorship."

9. If, as held by the Supreme Court, the Interstate Commerce Commission erred in construing the *specific* compulsory extension language of section 1(21) of the Interstate Commerce Act as authorizing it to require a railroad to extend into new territory, *a fortiori* it would be error for the Civil Aeronautics Board to assume any such power under a statute which does *not* contain express provision for compulsory extension.

10. It is doubtless because of considerations such as these that the Board seems to have itself recognized that existing law does not authorize it to make any such order as is here proposed. Two months after the initiation of this proceeding, the Board requested such power, stating in its Third Annual Report to Congress, dated November 14, 1942 (p. 15):

> *"Power to Initiate New Routes.—The Act does not now give to the Board power to initiate the establishment of new routes for air transportation services where applications therefor are not first filed by private individuals or companies, although the Board*

has power under section 401(h) of the Act to require 'amendments' to certificates on its own initiative, without application by the carrier, after notice and hearing. The word 'amendment' is vague and carries with it a limited concept. Consequently it has been argued that the Act now appears to contemplate that the Board shall await the filing of applications in order to authorize any substantial new service. If the Board is to develop air transportation in such a
107 manner as to keep pace with the requirements of national defense and our general national interests, it must be given the power to institute proceedings upon its own initiative for the purpose of determining that particular routes not then in operation should be established. The existence of such a power in the Board is particularly important with respect to international routes. Section 401(n) authorizes the Postmaster General to certify to the Board that new routes are required for the transportation of mail. Congress, therefore, has already decided that it is sound policy to provide for a power in the Government to initiate proceedings with respect to the
108 establishment of new mail routes, and the need is equally clear for such a power with respect to the establishing of all new routes." (Italics supplied.)

A similar statement was made by Chairman Pogue before the House Committee on Interstate and Foreign Commerce on February 2, 1943 (Hearings on H. R. 1012, pp. 44-45).

11. The Board itself has thus stated that "the Act does not now give to the Board power to initiate the establishment of new routes for air transportation services where applications therefor are not first filed by individuals or companies." The impact of this pronouncement cannot be avoided by calling an operation of 1200 miles through the

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Caribbean between the Canal and the United States a mere "extension" of an existing route in South America. As held in the *Oregon-Washington* case, even express power to order a carrier "to extend its line or lines" would not comprehend a route of such magnitude and character. Still less can the operation of such a route be compelled under a mere power to "amend," a word which, as the Board so well stated, "is vague and carries with it a limited concept."

12. Congress has not as yet seen fit to give to the Board the increased power for which it asked. Amendatory 110
legislation is still before the respective Committees of the House of Representatives and of the Senate. It would hardly be suggested that the Board should proceed with this hearing on the basis of mere expectation that Congress may make the necessary grant of power before the date for decision is reached.

III.

The Hearing Should be Adjourned Until This Question of Jurisdiction is Determined.

111

The petitioner believes that it would be manifestly contrary to the public interest for the Board to proceed with the hearings herein, if, as petitioner believes, the Board must ultimately decide that under existing law it is without legal power to take action. The volume of exhibits already on file and the broad scope of the issues show that these hearings will last for many weeks. All of the companies involved in this case, as well as the Board's staff, are deeply engaged in the war effort. The Board should be interested in preventing the useless expenditure of time, money and man-power and the unnecessary public controversy between the two largest American transportation enterprises in Latin America, which will be entailed if, after hearings have been held, the Board should ultimately determine that

it is without power to make an order herein, as the petitioner believes it necessarily will do.

The petitioner has withheld the filing of this motion because of the possibility that Congressional action might change the legal situation. However, with the hearing now set to commence and with Congress not having yet seen fit to make the requested enlargement in the Board's powers, petitioner has felt bound to file this motion.

WHEREFORE, your petitioner respectfully prays that the Board make an order dismissing this proceeding because of the Board's lack of legal power under existing law to take action herein and as beyond the jurisdiction of the Board. Your petitioner further prays that the Board hear oral argument on this motion and that, pending such argument and the determination to be made thereon, the Board should adjourn the hearings herein.

Dated, September 14, 1943.

Respectfully submitted,

PAN AMERICAN AIRWAYS CORPORATION,

By ROOT, CLARK, BUCKNER & BALLANTINE,
Its Attorneys.

HENRY J. FRIENDLY,
CHARLES C. MACLEAN, JR.,
J. P. KRANZ, JR.,
J. H. HAMSTRA,
Of Counsel.

Cross Motion of W. R. Grace & Co. 115

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779. 116

Communications with respect to this motion should be addressed to

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co., 117
Office and Post Office Address,
63 Wall Street,
New York 5, New York.

JOHN T. CAHILL,
FRED J. KNAUER,
Of Counsel.

118 *Cross Motion of W. R. Grace & Co.*

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of 119 PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

Now comes your petitioner, W. R. Grace & Co., and moves that the Board defer oral argument on and consideration of the motion of Pan American Airways Corporation to dismiss this proceeding for want of jurisdiction
120 until the final argument upon the merits, subsequent to the filing of the Examiners' report. For the grounds of such motion it represents as follows:

1. Your petitioner is, and since the organization of Pan American-Grace Airways, Inc. has been, the owner of half of the capital stock of said Pan American-Grace Airways, Inc., known as Panagra. Your petitioner was made a party to this proceeding by the order of the Civil Aeronautics Board dated September 10, 1942, which instituted this proceeding to determine whether Panagra's route should be extended to a terminal in the United States.

2. On September 15, 1943 Pan American Airways Corporation filed a motion to dismiss this proceeding for want

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of jurisdiction. This motion was denied by the Civil Aeronautics Board on or about September 23, 1943 by Order No. 2448 without prejudice to its renewal after the hearings.

3. Thereafter, on October 23, 1943, at the close of the six weeks of hearings in this Proceeding, Pan American Airways Corporation renewed its motion to dismiss.

4. On November 24, 1943 counsel for W. R. Grace & Co. was informed that the Civil Aeronautics Board would hear oral argument on the motion of Pan American Airways Corporation. 122

5. Petitioner believes that the previous denial of the motion of Pan American Airways Corporation prior to the hearings indicates that the Board desired to have the benefit of having the entire record before it in passing upon the question of jurisdiction. That question, particularly if the constitutional issue is raised as is indicated in the motion of Pan American Airways Corporation, involves a consideration of numerous issues of fact. These include, among others, the nature of the route and service proposed, the traffic available on this route, and revenue and expense which would result from operation of this route, the amount 123 of capital expenditure required, the ability of the carrier to make such expenditure, etc. Indeed, Pan American Airways Corporation, according to its motion papers, apparently seeks to inject into its motion to dismiss the entire question of the alleged limitation upon the scope of Panagra's corporate powers, which issue consumed a very large part of the six weeks of hearing and covers a great portion of the voluminous record.

6. The motion to dismiss, therefore, requires a thorough study and briefing of the facts. This task should not have to be undertaken twice. The study of the relevant portions of the record, and the preparation of the briefs and argu-

124 ment on the jurisdictional question at this time would involve a considerable duplication of the work and effort necessary for the presentation of this case upon the merits in the final briefs and arguments.

7. Postponement of the consideration of the jurisdictional issue until the final determination of the entire case upon the merits would also give the Board the benefit of any amendatory legislation which might be passed in the interim.

125 8. Petitioner believes, therefore, that the expenditure of considerable time and effort, the duplication of work, and the consideration of a question which may well become moot, can be avoided by deferring argument upon the question of jurisdiction and joining this question with the merits for consideration upon the final briefs and argument following the Examiners' report.

WHEREFORE, your petitioner respectfully prays that the Board make an order deferring consideration of the jurisdictional question and joining the same with the merits and deferring argument upon the jurisdictional question until
126 the final argument of the case upon the merits.

Dated, December 2, 1943.

Respectfully submitted,

W. R. GRACE & Co.

By WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Its Attorneys.

JOHN T. CAHILL,
FRED J. KNAUER,
Of Counsel.

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Correspondence re Scope of Motion and Argument.

Letter of Root, Clark, Buckner & Ballantine.

(Letterhead of)

ROOT, CLARK, BUCKNER & BALLANTINE
31 Nassau Street
New York 5

December 3, 1943

C. Edward Leasure, Esq.,
Chief Examiner,
Civil Aeronautics Board,
Washington 25, D. C.

128

Dear Sir:

Re Docket No. 779

We have received today a copy of the "Cross Motion of W. R. Grace & Co." requesting that the Board "make an order deferring consideration of the jurisdictional question and joining the same with the merits and deferring argument upon the jurisdictional question until the final argument of the case upon the merits."

We were informed on November 24, 1943, that the Board had determined to hear oral argument on the jurisdictional question before the parties were required to file briefs with the Examiner upon the merits. The "Cross Motion of W. R. Grace & Co." is thus, in reality, a motion for reconsideration of this determination.

129

The motion states that:

> "Petitioner believes that the previous denial of the motion of Pan American Airways Corporation prior to the hearings indicates that the Board desired to have the benefit of having the entire record before it in passing upon the question of jurisdiction."

The Board is surely in a much better position than any of the parties to know why it made its order of September 23, 1943, with respect to the motion to dismiss, and apparently

it does not regard this action as in any way inconsistent with its present decision to hear oral argument on the jurisdictional question before requiring the parties to brief the merits. Moreover, it is significant that the Board's order of September 23, 1943, denied the motion "without prejudice to its renewal *at the close of the hearing* in said proceeding", and not "without prejudice to its renewal *after* the hearing", as stated in the Cross Motion of W. R. Grace & Co. (par. 2).

The jurisdictional question is a simple question of statu-
131 tory construction, namely, whether Congress did or did not empower the Board to require an air carrier to make a substantial addition to its operations. Decision of that issue of law does not require the tedious searching of the record portrayed in paragraph 5 of the Cross Motion. That a route from the Canal Zone to the continental United States, some 1,200 miles in length, would be a substantial addition to the operations of Pan American-Grace Airways, is not, we assume, disputed. Determination of the question of statutory construction presented by the motion to dismiss will not require the Board to examine into the details of the estimates as to capital expenditures, traffic, revenues and expense. Counsel for Grace appear to have confused
132 the question whether Congress conferred power upon the Board to take the action *of the general sort* here under consideration, which is presented by the motion to dismiss, with a different question, namely, whether even if the general power had been and could constitutionally be granted, the taking of such action *in a particular case* would not, on the facts there presented, constitute a deprivation of property without due process of law.

As at present advised, we do not believe that the question of the agreement between Pan American Airways and W. R. Grace & Co. at the time of the organization of Pan American-Grace Airways with respect to the scope of that company's operations forms an essential part of the argument. However, even if the parties were required to brief

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this question at the present time, the work involved would be only a small fraction of the labor required for a complete brief on the merits, which must include such issues as general questions of public convenience and necessity, the adequacy of the connecting service, the "fourth trip" controversy, the Camaguey stop, the general effect of Section 408 of the Act, Grace's contention that Section 408 is not applicable here, Pan American's claims of demonstrated evil effects of the steamship connection, questions relating to the nature of W. R. Grace & Co. and the extent of its activities, and others too numerous to mention here.

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Little need be said as to the suggestion in paragraph 7 of the motion that:

> "Postponement of the consideration of the jurisdictional issue until the final determination of the entire case upon the merits would also give the Board the benefit of any amendatory legislation which might be passed in the interim."

Apart from legal questions, certainly the Board would not wish to put itself in the position of continuing with this proceeding on the basis of a hope of enactment of amendatory legislation if it is convinced that the power proposed to be exercised is one which the Congress has not yet conferred.

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Respectfully yours,

ROOT, CLARK, BUCKNER & BALLANTINE

Root, Clark, Buckner & Ballantine,
Attorneys for Pan American Airways Corporation

HENRY J. FRIENDLY
J. P. KRANZ, JR.
Of counsel

Copies to all parties of record.

136 *Correspondence re Scope of Motion and Argument.*

Letter of Gambrell & White.

(Letterhead of)

GAMBRELL & WHITE
Suite 825 The Citizens & Southern Bank Bldg.
Atlanta, Ga.

December 27, 1943

Civil Aeronautics Board
Washington, D. C.

137

Dear Sirs:

In re: Docket 779

We have received copies of the Board's order of December 17, 1943 denying the "cross motion" of W. R. Grace & Company, and the letter of Mr. Leasure dated December 17, 1943 setting the time for oral argument and the filing of briefs with respect to the motion to dismiss the proceeding under Docket 779.

The Board's order and Mr. Leasure's letter speak of the "motion of Pan American Airways Corporation to dismiss the proceeding in Docket No. 779." We assume that the
138 Board is not overlooking the motion to dismiss filed by Eastern Air Lines on October 21, 1943, and that the Board desires argument and brief with respect to all grounds for dismissal of the proceeding. It is therefore our plan, unless otherwise advised by the Board, to file brief and to present oral argument on all of the grounds stated in Eastern's motion to dismiss, namely:

> "1. It is clear from all of the pleadings and evidence that Panagra in the circumstances is not fit, willing and able to perform the service under consideration in this proceeding, that the public convenience and necessity do not require such service by Panagra, and that the authorization of such service by Panagra would be contrary to law and the public interest.

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"2. The Board lacks legal power to grant authorization to Panagra without first giving full hearing and consideration to the application of Eastern under Docket 782, as required by the Act of 1938 and the Constitution of the United States.

"3. The Board lacks power to grant a new route to Panagra for which Panagra has not applied.

"4. The Board cannot legally grant a new route to Panagra because it is controlled by a surface transportation company which has made no attempt to show and cannot show that it can use aircraft to public advantage in its operation and will not restrain competition.

"5. The Board cannot legally grant the route to Panagra because control of that carrier by either Pan American, W. R. Grace & Co. or both would prevent rather than promote 'the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense.'"

Each of the foregoing grounds challenges the jurisdiction or power of the Board to act in the proceeding under Docket 779. Ground No. 3 denies the Board's basic jurisdiction of a new route proceeding in which no application has been filed.

Ground No. 2 challenges the Board's jurisdiction to proceed under Docket 779, even assuming basic jurisdiction of a proceeding of this type, without granting to Eastern full hearing and consideration of its timely application to provide service over the very route under consideration in Docket 779. It is a well settled principle of law that a court or administrative agency may lose "jurisdiction to proceed", even though it had jurisdiction originally, by denying

due process of law to those who are or should be parties to the proceeding. See for example, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

Grounds Nos. 1, 4 and 5 challenge the power of the Board to grant the authorization apparently under consideration in Docket 779. It is Eastern's plan to show that, *on the pleadings alone*, it can be determined that the Board has no power to grant an authorization to Panagra under Docket 779. Furthermore, since motion to dismiss is being considered after the hearing, Eastern plans to point out,
143 without detailed reference to the record, that the evidence is in accordance with the pleadings, demonstrating that the Board lacks power to grant authorization to Panagra in this proceeding.

The motion of Pan American Airways sets forth only one of these grounds for dismissal. Pan American has been granted one hour in which to present its oral argument in support of its one ground for dismissal. Inasmuch as Eastern wishes to present argument on *five* grounds for dismissal, Eastern respectfully requests that it be given at least one hour for such argument.

Very truly yours,

144

GAMBRELL & WHITE
Attorneys for Eastern Air Lines, Inc.

By (Sgd) E. SMYTHE GAMBRELL

E. SMYTHE GAMBRELL

Copies to all parties.

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Letter of Root, Clark, Buckner & Ballantine.

(Letterhead of)

ROOT, CLARK, BUCKNER & BALLANTINE,
31 Nassau Street
New York 5

January 3, 1944

C. Edward Leasure, Esq.,
Civil Aeronautics Board,
Washington 25, D. C. 146

Dear Sir:

Re: *Docket No. 779*

We have received a copy of the letter of counsel for Eastern Air Lines dated December 27, 1943 stating that it is their plan, unless otherwise advised by the Board, to file brief and present oral argument on five different grounds stated in the motion to dismiss filed by Eastern Air Lines on October 21, 1943.

It has been our understanding that the motion set for oral argument by the Board was not the motion of Eastern Air Lines but the motion of Pan American Airways Corporation to dismiss the proceeding on jurisdictional grounds; that Eastern was being accorded an opportunity to participate in the argument because the third ground of its motion was similar to the ground advanced in Pan American's motion; but that the Board did not intend to hear argument at this time on the other grounds advanced in Eastern's motion. 147

On behalf of Pan American Airways Corporation, we object to any such broadening of the argument to be heard at this time as is indicated in the letter of counsel for Eastern. Any such course would inevitably lead to extended discussion of the very large record in this docket. This would be premature at this time. Moreover, if considera-

148 *Correspondence re Scope of Motion and Argument.*

tion of the record ever becomes necessary, the Board should have the advantages of a report by the examiners and of much more extensive brief and argument than is contemplated for the argument on the motion to dismiss.

Very truly yours,

ROOT, CLARK, BUCKNER & BALLANTINE,
Attorneys for Pan American Airways Corporation,

By (Sgd) HENRY J. FRIENDLY

149

HENRY J. FRIENDLY

Copies to all parties.

Telegram from Chief Examiner of Civil Aeronautics Board.

WESTERN UNION

Received 1944 Jan 8 PM 4:14

150

WASHINGTON DC 8 3:38 P

JOHN T CAHILL

63 WALL ST (NEW YORK NY)

RE ISSUES BRIEFS AND ARGUMENT DOCKET 779 JANUARY 31, 1944. BOARD ASSIGNED ARGUMENT PAN AMERICANS MOTION TO DISMISS LACK OF JURISDICTION. ISSUE RESTRICTED TO THAT POINT. PARTICIPATION OF INTERVENERS PERMITTED IN SUPPORT THEREOF. NO ACTION YET ON OTHER MOTIONS TO DISMISS

C EDWARD LEASURE CHIEF EXAMINER

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Excerpt From Pan American's Brief Before the Civil Aeronautics Board on Motion to Dismiss, Dated January 14, 1944, Page 4, Line 16 to Page 5, Line 4, Inclusive. 151

Pan American's motion to dismiss raises a question as to the construction of a few words in Section 401(h) of the Civil Aeronautics Act, as applied to facts which are beyond dispute. While we are confident that no fair consideration of the detailed evidence of record could leave the slightest doubt that definite agreements as to the territory in which Pan American-Grace was to operate were made between the parties before the company was organized and were confirmed as recently as the "settlement" agreement of 152
February 14, 1939 (Ex. P-35, p. 16), we do not consider this essential to showing the Board's lack of jurisdiction; and, in the interest of simplifying the present argument and avoiding any necessity for detailed analysis of the evidence, we have therefore omitted discussion of these agreements from our brief and argument on the present motion. The various charges and countercharges which occupy so many pages of the voluminous record are still more clearly irrelevant to the issue here presented for determination.

Our argument will be devoted to a single proposition of law,—namely, that the Civil Aeronautics Act, as it presently exists, does not authorize the Board to require an air 153
carrier to extend its lines into a general area not theretofore served by it, and that therefore the Board is without jurisdiction herein.

Excerpt From C. A. B. Public Counsel's Brief Before the Civil Aeronautics Board on Motion to Dismiss, Dated January 15, 1944. 4 Complete Paragraphs on Page 2.

Before proceeding to the discussion of the statute and the decided cases, it will be well to define the scope of the question under consideration. In addition to the ultimate issue of whether or not public convenience and necessity require the extension of the route to Miami, the following two issues are presented:

1. *The statutory problem.* What is the meaning of the statute? Does it authorize extensions of a route, and if so, what kind of extensions. (For example, does it empower the Board to make extensions which are within the scope of the carrier's undertaking; or does it empower the Board to make extensions which, although they are beyond the scope of the carrier's undertaking, are reasonable extensions and therefore not a deprivation of property without due process of law?)

2. *The problem of application.* If the statute does empower the Board to order certain extensions, do the facts of this case show that this particular extension is one of the type which the Board has power to require?

The first issue is purely one of *construction* of the statute; the second is one of *application* of the statute to the facts of the case. It is the purpose of this brief to treat only with the first issue—the statutory problem. It is not the purpose of this brief to consider whether this particular extension from the Canal Zone to Miami is one of the type of extensions permitted by the statute because, in the opinion of Public Counsel and for the reasons set forth hereinafter, this problem would require determination of the constitutional question of deprivation of property without just compensation or due process of law. Such a question cannot properly be determined without consideration of the entire record and in a manner coextensive with examination

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of the merits of the case. Nor can it be argued or determined specifically until the final order of the Board is known.

Excerpts from Oral Argument Before the Civil Aeronautics Board on Motion to Dismiss, January 31, 1944.

ARGUMENT BY MR. FRIENDLY (Pan American)

S. M., page 5, lines 7 to 16 (R.* 8412):

Mr. Friendly: If the Board please, I think this is a somewhat novel occasion, the first time that I can remember that 158
I have had the privilege of appearing before you to argue what I believe is called a pure question of law. That question is whether the Board has power, as said in your Show Cause Order, to authorize and require an air carrier to engage in a new operation 1,200 miles long in an area never previously served by it, and which the carrier has not requested authorization to serve.

S. M., pages 27-29 (R. 8434-6)

Now, the first of those arguments makes it desirable to emphasize an important distinction that is referred to in the conclusion portion of our brief. There are two possible 159
bases on which a compulsory extension order might be attacked on constitutional grounds. Of course, such an order would be subject to attack, whatever the other situations might be, if in a particular case it could be demonstrated that the financial results of the extension order would be confiscatory, and where the attack was on that ground there would naturally have to be a thorough investigation of the amount of the investment required, and the financial prospects, and all these differences between air transportation and other forms of transportation would be of weight. But that is not the ground of attack to which the Supreme Court referred in the Oregon case, and for a very

* "R" refers to the pages of the complete record as renumbered by the Civil Aeronautics Board.

good reason. The Interstate Commerce Commission had found that—had found in that case that the extension would prove a remunerative investment, and the Court held this finding to be supported by evidence, and, therefore, conclusive upon it, and I assume, contrary to some intimations in the briefs, that when the Supreme Court of the United States says that it holds a finding to be conclusive upon it, it means exactly that. The constitutional doubts to which the Court referred, were of an entirely different sort. They were founded upon the principle that a railroad was the
161 property of its proprietors, and that to require extensions beyond the scope of its commitment to the public service, was a taking of property prohibited by the Federal Constitution, however bright the financial prospects might be claimed to be, and that principle applies to air transportation exactly as to anything else.

For that reason all of the pages of argument as to capital costs and the relation of capital costs to revenues, and the possibility of salvaging some of the capital if the operation turns out badly, and the prospects for recouping losses out of subsidies, all seems to me to be irrelevant.

The other constitutional argument is an attempt to show that the Court was mistaken in thinking that constitutional
162 doubts, in fact, existed. It is claimed that the Court erred in believing these earlier decisions to have held that due process was denied when service beyond the undertaking of the carrier was required, and it is said that the only rule that ought to exist or, in fact, did exist, was some general requirement of reasonableness, and the cases are put through a kind of centrifuge, out of which a few emerge which are said to hold that contrary to the Court's statement, reasonable extensions have been upheld even though they were not within the undertaking of the carrier.

Now, actually all those cases were decided, as far as I can find, before the Oregon case, most of them were cited in the Court's opinion or in the briefs, an examination of them shows that the orders were within the scope of the

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carrier's undertaking, and where the Courts did not expressly state this as they usually did, the facts were so plain as to make statement unnecessary. But this discussion also is really beside the point.

The question now before the Board is not what the Supreme Court might ultimately decide on the constitutional issue, if that issue were to be squarely presented to it, but simply a question of statutory construction. The construction of the Act depends on the existence of grave constitutional doubts, not on their ultimate solution, and with the Supreme Court of the United States stating that such doubts exist this Board, to my mind, is hardly in a 164
position to say that they do not. Indeed, the fact is that there can hardly ever have been a case where this rule of construing to avoid constitutional doubts has the force that it does in this one. Normally the doubts arise either from general principles or decisions of lower courts on the same point or of the Supreme Court on analogous points or a combination of those, but here we have a decision of the Supreme Court on the precise question and still more unusual we have a decision of the Supreme Court known to Congress, when this very Act was in process of enactment, so that if Congress had wished to heed the Court's warning and make itself clear, it could easily have done so. 165
Because of this and the other considerations that I have mentioned, we think that the Board should not by blind adherence to an alleged dictionary meaning, take upon itself a power which Congress has shown every intention not to grant.

ARGUMENT BY MR. WANNER, PUBLIC COUNSEL

S. M., page 107 (R. 8514)

Mr. Wanner: The problem before the Board today is one of statutory construction. I want to make it clear at the outset that I want to discuss the general problem of statu-

tory construction, rather than the specific application of the statute to Panagra.

S. M., page 137, lines 14 to 27 (R. 8544)

Mr. Warner [Board Member]: Mr. Wanner, the subject of jurisdiction has so far been argued in very broad terms with little reference to the fact of this particular case. I wondered whether you felt that there was anything in the facts of this case that set it aside jurisdictionally from what might be a more typical instance, the more typical
167 instance perhaps being that of a more active unwillingness as compared with a perhaps passing unwillingness that results in this case from an internal deadlock?

Mr. Wanner: As I have stated, I am not particularly prepared to talk on that, for the reason that it involves an examination of the entire transcript, and there are many implications to be drawn from the transcript and from the record. • • •

S. M., page 141, lines 5 to 9 (R. 8548):

Mr. Ryan [Board Member]: Let's forget about the facts of this particular case. We are talking about, as you*
168 pointed out in the beginning of your argument the fundamental principle of whether Congress has granted us this power, not its application to this particular case. • • •

* The word "you" is erroneously recorded in the transcript as "I".

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Petition of W. R. Grace & Co. for Reargument and Reconsideration.

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

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Attorneys for W. R. Grace & Co.

Of Counsel:

JOHN T. CAHILL,
FRED J. KNAUER,
ELMER J. KELSEY,
WILLIAM F. KENNEDY.

172 *Petition of W. R. Grace & Co., for Reargument and Reconsideration.*

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TO THE CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

NOW COMES W. R. Grace & Co. and respectfully petitions
174 the Board for reargument and reconsideration of its Opinion and Order No. 2867 dated May 24, 1944, granting the motion of Pan American Airways to dismiss this proceeding for lack of jurisdiction and dismissing said proceeding, Docket No. 779.

SPECIFICATION OF ERRORS.

In support of this petition, W. R. Grace & Co. respectfully avers that the Civil Aeronautics Board, in its action aforesaid, erred in the following respects:

I. The Board erred in deciding, upon the facts mentioned in its opinion, that the proposed Panagra extension is *per se* unreasonable and beyond the Board's power.

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II. The Board erred in ruling upon the application of its power to this particular extension, a question not before the Board on this argument.

III. The Board erred in taking into consideration as bearing on its jurisdiction under Section 401(h) of the Act any controversy between the co-owners of Panagra.

I.

THE BOARD ERRED IN DECIDING, UPON THE FACTS MENTIONED IN ITS OPINION, THAT THE PROPOSED PANAGRA EXTENSION IS *per se* UNREASONABLE AND BEYOND THE BOARD'S POWER. 176

The heart of the Board's decision, as we understand it, is simply this:

1. That the Board has full power, by amendment of a carrier's certificate under Section 401(h) "upon its own initiative" to extend a carrier's route.

2. That this power exists, however, where the Board is acting on its own initiative, only in case they find the proposed extension to be reasonable; that, under Justice Cardozo's opinion in the *Oregon* case*, such an extension will not be considered reasonable where the extension is "so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal". 177

We are not, for the purpose of this petition for reconsideration, contesting the Board's interpretation of the statute. For the present purpose, but without prejudice, we accept this interpretation. We maintain, however, that this interpretation makes impossible a dismissal of this

* *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14 (1933), herein referred to as the *Oregon* case.

178 proceeding on this motion. For so interpreted the statute can only be applied after an examination of the facts. Reasonableness in its very essence involves a consideration of all the relevant facts.

Thus, as the Supreme Court said in *Chicago & Northwestern Railway Company* v. *Ochs*, 249 U. S. 416, 421 (1919) in holding that the Warehouse Commission of Minnesota could compel a railroad company to extend a track:

> "Of course, the expense is an important element
179 to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one. The nature and volume of the business to be affected, the revenue to be derived from it, the character of the facility required, the need for it and the advantage to be realized by shippers and the public are also to be considered. Tested by these criteria we think the order in question is not arbitrary, but reasonable."

Or, as the court phrased it in *Sussex Land & Live Stock*
180 *Co.* v. *Midwest Refining Co.*, 294 Fed. 597, 602-3 (C. C. A. 8th, 1923):

> "What is 'reasonable' depends upon a variety of considerations and circumstances."

None of the facts mentioned by the Board in and of themselves and without relation to the whole record can possibly constitute unreasonableness *per se* and as a matter of law.

The reasonableness or unreasonableness of this particular extension and the question whether it is "so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal" are purely and entirely questions of fact and can only be decided in the light of all of the evidence in the record in Docket 779.

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The Board quoted as its guiding principle an extract from Justice Cardozo's opinion that

> "The action of the Commission must have a *basis in reason*, and its order must be viewed with reference to the length and other conditions of the line or lines to be enlarged." (Italics added.)

To consider whether the particular extension has "a basis in reason", and to consider the "other conditions", obviously requires an analysis of the entire record and a 182
thorough examination of all the evidence.

The Board recognizes this because, after stating the principles of its decision, it then "on the basis of these principles • • • turn[s] to the consideration of the extension of Panagra's system to a terminal point in the United States" (Opinion, p. 10). It proceeds to hold that such an extension is unreasonable, "in the light of the conditions surrounding the extension here involved • • •" because

> (a) The extension would increase route mileage by about 1,200 miles or 14%.
>
> (b) The extension would require a capital investment of about $800,000, as against gross assets of 183
> $10,700,000 at the end of 1942.
>
> (c) The extension would give the carrier direct access to gateways in the United States, and would permit it to connect directly with the domestic air transportation system of the United States, without the necessity of relying on a connecting carrier.

In summary, the Board says that while length of mileage of the new service and additional investment have been factors in reaching this conclusion, "the principal consideration" is that by eliminating Panagra's dependence on a connecting carrier between the Canal Zone and the United

184 States the extension "would constitute a basic transformation of the character of the carrier."

It is respectfully submitted that none of these considerations in and of themselves constitute unreasonableness *per se* and as matter of law. All of them involve questions of facts and cannot be decided as matters of law but only upon consideration of all of the evidence in the record. Twelve hundred miles or $800,000 are meaningless terms from the standpoint of reasonableness unless considered not merely
185 in the light of the few isolated items mentioned in the Opinion, but in the light of all the facts of the case. Whether or not an extension to the United States changes the "fundamental character" of Panagra's operations depends not only on the relation of this change to the few isolated factors mentioned in the Opinion but, as Justice Cardozo's opinion in the *Oregon* case indicates, on the relation of the change to all of the facts of the case.

The advantages to Panagra itself and to the public interest must be considered in arriving at a conclusion as to the reasonableness of the extension. The expenditure involved is relevant not only in relation to the company's net worth,
186 but also in relation to its prospective net earnings from the extension. The character and adequacy of the existing service between Miami and the Canal Zone is a factor. The length of the extension, not so much as an arbitrary number of miles, but in relation to the intervening terrain and in relation to the essential nature of air transport must be considered.

Every extension, of course, removes some previous dependence on a connecting service. But of vital bearing on whether or not the extension changes Panagra's essential character, is the nature and scope of Panagra's existing service and the character of its traffic, and the manner in which it has heretofore served traffic to and from the United States,—considered in detail and not merely in a sweeping generality.

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Finally, and of distinct importance among the circumstances which must be considered in ascertaining whether the proposed extension is reasonable and thus within the limitations of the Board's power, are the facts regarding the public interest: the development of an air transportation system properly adapted to the foreign commerce of the United States; the promotion of adequate and efficient service "without unjust discriminations, undue preferences or advantages or undue or destructive competitive practices" and with a view to providing "competition to the extent 188
necessary to assure the sound development of an air transportation system".

Certainly there is nothing in the few isolated facts referred to in the Opinion,* even accepting them at face value, which justifies the conclusion, as matter of law, that the proposed extension is *per se* "so *vast* and *sudden* as to work an *utter* transformation of the character" of the carrier, "making what was extended the *incident* and the extension the *principal.*" That the extension would change Panagra's essential character is but a conclusion which certainly cannot be adduced from the single fact on which the Board relies,—namely, that it frees Panagra of dependence on a connecting carrier. An examination of the full 189
facts will, we believe, show that the proposed extension will not change Panagra's fundamental character,—certainly not in any such sense as would make the proposed extension an unreasonable one. The very force and strength of the words used in Justice Cardozo's opinion in the *Oregon* case, on which the Board relies, indicate that strong factual proof and not mere inference from a few isolated facts, much less mere legal conclusion without hearing, briefing and

* In view of the requirement of Section 1005(f) of the Civil Aeronautics Act that the order set forth the findings of fact upon which it is based, and as a general reference to the whole record is insufficient, it must be concluded that these grounds are the only ones upon which the Board acted. *Saginaw Broadcasting Co.* v. *F. C. C.*, 96 F. (2d) 554, 557 (Ct. App. D. C., 1938), cert. denied 305 U. S. 613 (1938); see *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86 (1930).

argument of all the facts is required before this rule in the *Oregon* case is to be applied.

The Board's interpretation in effect emasculates the very power which the Board found it had. Public policy dictates that the Board must have the power to order reasonable route extensions even when there is no application therefor by the carrier, particularly with respect to international routes. See e.g. 1942 *Annual Report of the Civil Aeronautics Board*, p. 15. If the mere fact that a carrier,
191 when extended, eliminates a connection and carries its traffic through is *ipso facto* to be considered such an "utter transformation" as to put the extension beyond the power of the Board, then the Board lacks power to act in *precisely those situations where its action is necessary.*

It stands to reason that the situations in which the Board would normally order the extension of a carrier are those where the extension would result in such advantages as elimination of a connecting service, or giving the carrier direct connections with other lines, or enabling it to carry its traffic through.*

Therefore, far from concluding that "It does not seem
192 reasonable to believe that Congress contemplated that such a change . . . should be compelled by Government order," we believe that Congress must have contemplated route extensions in exactly this type of case. In fact, if a proposed extension did *not* entail such advantages, the question might well be raised as to whether it was not unreasonable or unnecessary and thus beyond the Board's power!

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* The Board has frequently extolled the advantages of one-carrier through service. See Order Serial No. 2820, p. 3, and compare Order Serial No. 2699, p. 10; *Atlantic Seaboard* case, Docket 445 (1944).

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II.

THE BOARD ERRED IN RULING UPON THE APPLICATION OF ITS POWER TO THIS PARTICULAR EXTENSION, A QUESTION NOT BEFORE THE BOARD ON THIS ARGUMENT.

The question of the Board's jurisdiction involves two considerations:

First, the general question of statutory construction as to whether the Board has the power *in any case* to order a route extension for which no application has been made. This was the only question involved on this argument.

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Second, the Board having decided that it has such power only where such extension is reasonable, the question whether, under all the facts and circumstances of this particular case, the extension of Panagra's route to a United States terminal is reasonable, and thus within the scope of the Board's power. This question was not before the Board on this argument.

The action of the Board, in basing its decision upon this second consideration, was improper, in that it deprived the parties of their right to a full hearing on the facts, in which they could properly brief, argue and present to the Board the facts and arguments related to the second consideration —the application of the general rule to this particular extension.

195

The record is crystal clear that only the first of the above two considerations was being discussed before the Board on the recent argument of Pan American's motion.

Pan American's Motion

The motion made by Pan American at the opening of the hearing before the Examiners was not made on the basis of the entire record. At that time there was no record. The motion, when renewed by Pan American at the close of the hearings, was on the identical printed motion paper. This

motion raised the general question of statutory construction as to whether the Civil Aeronautics Act gave the Board any power at all under any circumstance to "require a carrier to operate in a different territory from that specified in its certificate" (p. 3).

Pan American contended that the Board had no such power. The Board has held that it has such power provided the extension is a reasonable one. Obviously then the next step should be to proceed to a hearing on the
197 record to determine whether this particular extension is reasonable or unreasonable.

Action of Board on W. R. Grace & Co.'s Cross Motion

Not only is this apparent from Pan American's motion, but it is emphasized by what transpired in relation to the cross motion of W. R. Grace & Co. A cross motion was made on December 2, 1943 on behalf of W. R. Grace & Co. to defer consideration of the motion of Pan American until the final argument on the merits, subsequent to the filing of the Examiners' report. This cross motion was made on the ground that the motion would involve a consideration of
198 issues of fact which would require a thorough study and briefing of the evidence.* Thus Grace suggested combining the two considerations involved in the entire jurisdictional question (*supra*, p. 8 [page 65 of this Appendix]).

But Grace's cross motion was *denied* by the Board's Order No. 2586, dated December 6, 1943. This ruling was error on the part of the Board, and the Board's recent decision serves to accentuate that error.

With reference to the cross motion of W. R. Grace & Co., counsel for Pan American had written a letter to the Chief

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* The cross motion stated:

"These include, among others, the nature of the route and service proposed, the traffic available on this route, the revenue and expense which would result from operation of this route, the amount of capital expenditure required, the ability of the carrier to make such expenditure, etc." (p .2)

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Examiner of the Civil Aeronautics Board, dated December 3, 1943, in which they stated as follows:

> "*The jurisdictional question is a simple question of statutory construction, namely, whether Congress did or did not empower the Board to require an air carrier to make a substantial addition to its operations. Decision of that issue of law does not require the tedious searching of the record portrayed in paragraph 5 of the Cross Motion.* • • • *Determination of the question of statutory construction presented by the motion to dismiss will not require the Board to examine into the details of the estimates as to capital expenditure, traffic, revenues and expense.* Counsel for Grace appear to have confused the question whether Congress conferred power upon the Board to take the action *of the general sort* here under consideration, which is presented by the motion to dismiss, with a different question, namely, whether even if the general power had been and could constitutionally be granted, the taking of such action *in a particular case* would not, on the facts there presented, constitute a deprivation of property without due process of law." (First italics ours.)

This statement leaves no doubt of the fact that Pan American by its motion was raising purely a general question of law and was not seeking a ruling upon the application of the law to the facts here.

Action of Board on Points Raised by Eastern Air Lines

The same conclusion is inescapable from the Board's action on points raised by Eastern Air Lines. During the course of the hearings a motion had also been made on behalf of Eastern Air Lines to dismiss the proceeding. Unlike the

motion of Pan American, Eastern's motion was in part based on the record and raised issues of fact.

In connection with the intention of the attorney for Eastern Air Lines, as revealed in his letter to the Board dated December 27, 1943, to argue the various points he had raised in his motion to dismiss, counsel for Pan American wrote a letter to the Board's Chief Examiner dated January 3, 1944, in which they stated as follows:

"On behalf of Pan American Airways Corpora-
203 tion, we object to any such broadening of the argument to be heard at this time as is indicated in the letter of counsel for Eastern. *Any such course would inevitably lead to extended discussion of the very large record in this docket. This would be premature at this time. Moreover, if consideration of the record ever becomes necessary, the Board should have the advantages of a report by the examiners and of much more extensive brief and argument than is contemplated for the argument on the motion to dismiss.*" (Italics ours)

204 Thereafter, by a telegram of the Board's Chief Examiner, dated January 8, 1944, the issues were restricted to Pan American's motion, and the points raised by Eastern were ruled out. This again shows that the motion was intended to be confined solely to the general legal point.

Briefs of the Parties

The briefs of the parties reveal a similar understanding of the issues raised by Pan American's motion to dismiss. For example, Pan American's brief states as follows:

"Our argument will be devoted to a single proposition of law,—namely, that the Civil Aeronautics Act, as it presently exists, does not authorize the Board to require *an air carrier* to extend its lines into

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a general area not theretofore served by it, and that *therefore* the Board is without jurisdiction herein." (pp. 4-5) (Italics ours)*

Similarly, Public Counsel's brief states:

"The first issue is purely one of *construction* of the statute; the second is one of *application* of the statute to the facts of the case. It is the purpose of this brief to treat only with the first issue—the statutory problem. *It is not the purpose of this brief to* 206 *consider whether this particular extension from the Canal Zone to Miami is one of the type of extensions permitted by the statute* * * *. Such a question cannot properly be determined without consideration of the entire record and in a manner coextensive with examination of the merits of the case.* Nor can it be argued or determined specifically until the final order of the Board is known." (p. 2) (Last italics ours)

In harmony with the disclaimers of Pan American and with the Board's rulings, W. R. Grace & Co. refrained from presenting an extensive analysis of the facts and evidence. 207 While its brief did refer to certain facts in the record in this case, that was done to meet the argument of unconstitutionality, which Pan American had indicated (Motion, p. 4) it would make, and to distinguish the *Oregon* case. (See Point II of the brief of W. R. Grace & Co., discussing the constitutional issue.) The few facts presented were only illustrative, and were by no means an exhaustive portrayal of the many facts in the record establishing the reasonable-

* Pan American's brief also says:
"* * * in the interest of simplifying the present argument and avoiding any necessity for detailed analysis of the evidence, we have therefore omitted discussion of these agreements from our brief and argument on the present motion. The various charges and countercharges which occupy so many pages of the voluminous record are still more clearly irrelevant to the issue here presented for determination." (p. 4)

ness of the proposed extension in the light of all the circumstances.*

Oral Argument

A similar understanding of the very limited question before the Board on this argument is revealed throughout the stenographic minutes of the oral argument:

For example, counsel for Pan American remarked that this was the first time " * * * I have had the privilege
209 of appearing before you to argue what I believed is called a pure question of law."** (S. M. p. 5)

Public Counsel, opening his argument before the Board, stated as follows:

> "The problem before the Board today is one of statutory construction. I want to make it clear at the outset that I want to discuss the general problem of statutory construction, rather than the specific application of the statute to Panagra." S. M. p. 107)***

Remarks made at the oral argument by members of
210 the Board likewise indicated an intention to confine the argument of the motion to the general legal principle without involving the application to this particular controversy.

For example, the following statement is made by Member Ryan in addressing Public Counsel:

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* Briefs analyzing the evidence frequently run between 100 and 200 pages in length. See, e.g., the briefs in Docket 445, *et al.*

** Cf. S. M. pp. 27-29 where counsel for Pan American limited the constitutional issue he was raising on this argument, and again emphasized that this motion raised "simply a question of statutory construction".

*** Cf. S. M. p. 137:

> "Mr. Warner: 'Mr. Wanner, the subject of jurisdiction has so far been argued in very broad terms with little reference to the fact of this particular case. I wondered whether you felt that there was anything in the facts of this case that set it aside jurisdictionally from what might be a more typical instance * * *?'
>
> "Mr. Wanner: 'As I have stated, I am not particularly prepared to talk on that, for the reason that it involves an examination of the entire transcript * * *'."

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> "Mr. Ryan: 'Let's forget about the facts of this particular case. We are talking about, as you† pointed out in the beginning of your argument, the fundamental principle of whether Congress has granted us this power, not its application to this particular case. * * *' " (S. M. p. 141)

It is thus apparent from the motion of Pan American itself; from the correspondence relating thereto; from the Board's earlier rulings on both the cross motion of W. R. Grace & Co. to defer consideration of the motion to dismiss, and on the efforts of Eastern to broaden the scope of the issues; from the briefs of the parties; and from the transcript of the oral argument, that it was understood that the only question under consideration was the general power of the Board under the Civil Aeronautics Act to compel any route extension at all.

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In view of Pan American's repeated disclaimers that its motion raised any question of fact or required any "searching of the record", or concerned the application of the general rule to this particular case, the opinion of the United States Supreme Court in the recent case of *Flournoy* v. *Wiener*, 321 U. S. 253 (decided Feb. 28, 1944) is most appropriate. That case involved two questions, and Chief Justice Stone, after pointing out that appellant had named only one of these as a point on which he intended to rely, and that because of the appellant's disclaimer appellees proceeded on argument and in briefs on the assumption that only one question was before the court, stated:

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> "But this question is not before us because appellant, by his statement of points to be relied on, has affirmatively excluded it from consideration on this appeal and has limited himself to the differ-

† The word "you" is erroneously recorded in the transcript as "I".

ent question arising under the Fifth Amendment. *In any case we ought not to consider it here because in reliance upon this declaration neither party has briefed or argued it in this Court. * * * it is not the habit of this Court to decide important constitutional questions which the parties have not presented, briefed or argued.*" (p. 261) (Italics ours)

We cannot bring ourselves to believe that in this important case the Board is willing to decide such involved factual issues before they have even been "presented, briefed or argued".

Although six weeks were devoted to the taking of testimony in this proceeding, resulting in a record of about 3,500 pages of testimony and 500 exhibits, at an enormous expense to all concerned, it cannot be denied that the parties have never been given an opportunity to present briefs and argue the matter on the facts and the Examiners have never made their report thereon.* Consequently any determination here based on the facts is a clear denial of the hearing to which the parties are entitled.

Prior to its opinion, the Board's position as to the limits of its power to require an extension was in doubt. As Public Counsel's brief stated, the question of the application of the statute to the facts of this case could not "be argued or determined specifically until the final order of the Board is known" (*supra*, p. 12). It would be improper and unfair not to permit the parties now to address themselves specifically to the application of the Board's general power to the extension proposed in this proceeding.

Petitioner is entitled under the Act to a fair and full hearing as to whether or not on the facts of this particular case an order compelling Panagra to extend its route

* The decision is currently interpreted as blocking consideration of the record. See *American Aviation*, June 15, 1944, p. 42.

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would be reasonable and thus within the scope of its power. *Morgan* v. *United States*, 298 U. S. 468 (1936); *Morgan* v. *United States*, 304 U. S. 1 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937).

In the first *Morgan* case, the court said:

> "There must be a full hearing. • • •
>
> "The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." (pp. 480-1)

218

Contrary to this principle, in the present case the Board has heard neither evidence nor argument on the evidence.

In the second *Morgan* case, Chief Justice Hughes wrote:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one." (p. 18)

219

A fair hearing involves not only the right to submit all relevant evidence, *Donnelly Garment Co.* v. *National Labor Relations Board*, 123 F. (2d) 215 (C. C. A. 8th, 1941), but also the right to have that evidence considered and findings made thereon. *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 F. (2d) 258 (C. C. A. 7th, 1941).

220 *Petition of W. R. Grace & Co., for Reargument and Reconsideration.*

III.

THE BOARD ERRED IN TAKING INTO CONSIDERATION AS BEARING ON ITS JURISDICTION UNDER SECTION 401(H) OF THE ACT ANY CONTROVERSY BETWEEN THE CO-OWNERS OF PANAGRA.

Controversy between Panagra's stockholders cannot possibly have any bearing whatever on the legal question of the jurisdiction of the Civil Aeronautics Board under the provisions of an Act of Congress,—the only question
221 under consideration.

We believe that an examination of the history of this company, as set forth in the record in this case, will show that the principal controversies between the owners of the company have been related to route extensions. A determination that the Board had power, on its own motion, to grant the route extension under discussion would, therefore, relieve not just "one particular controversy" but would in fact "solve the basic difficulties of the Panagra joint ownership". And the Board is surely not warranted in assuming that an exercise of this power by the granting of the extension, would be frustrated by disobedience to
222 the Board's order by any of the parties, or by lack of power in the Board in such contingency to implement its action by appropriate enforcement procedure. In such a contingency the Board would have at its disposal with which to compel compliance with its order:

(1) prosecution of a recalcitrant party, its officers and directors. Civil Aeronautics Act, Section 902(a).

(2) judicial enforcement of its orders. Civil Aeronautics Act, Section 1007(a).

Your petitioner begs to take exception, most respectfully but most emphatically, to the two last paragraphs of the

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Board's Opinion regarding the controversy between the owners of the company, and to the paragraph on page 4 summarizing the Board's explorations of the possibility of working out a settlement thereof. The evenly balanced language of these paragraphs, by which the Board seeks to maintain an impartial position respecting the matters under discussion, results quite unintentionally in an unjust reflection upon W. R. Grace & Co. Reference to "the special interests and the other activities of the co-owners" of course implies identity of position in these matters. The record shows that Pan American has in other connections, and in this very proceeding, supported interests in conflict with Panagra. But after most elaborate efforts to uncover something showing a similar situation with respect to W. R. Grace & Co. (searching through thousands of letters and documents in Panagra's files, bringing in an ex-Grace employee and resorting to every known form of inquisitorial research), only the most trivial and inconsequential evidence on this point could be produced by Pan American's counsel.

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The summary of the Board's efforts to effect a settlement between the parties also leaves W. R. Grace & Co. in a particularly unwarranted light. At a joint meeting of Grace and Pan American representatives held by the Board on October 28, 1942, the Board made the suggestion (to be effective for the duration) referred to in the Opinion, namely:

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> "* * * that the parties enter into an agreement under which sufficient shares of the two stockholders would be transferred to an independent public voting trustee or trustees to permit the election to the Panagra Board of an independent director or directors, or under which such an independent public director or directors might be otherwise appointed, who would

be able to break the deadlock resulting from the equal division of the ownership of Panagra stock between Pan American and Grace."

On this occasion W. R. Grace & Co., while expressing the feeling that a voting trust was unnecessary to accomplish the purpose, did agree to the designation of an independent director or directors as the Board proposed. Mr. Trippe, who was present representing Pan American, refused to agree to a voting trust or to an independent director unless
227 limitations were imposed on the jurisdiction of this director which would have the practical effect of largely, if not completely, destroying his effectiveness to accomplish the purpose which the Board had in mind. This meeting was the last communication of the Board with W. R. Grace & Co. on this subject. A contemporaneous statement of the position of the parties on this occasion is embodied in a letter addressed to the Board by W. R. Grace & Co. on the day of the meeting, reading as follows:

"We wish to confirm our position taken at this morning's conference.

228 "We accept your suggestion in principle and, for the duration of the war, agree to the immediate addition to Panagra's Board of an odd director (satisfactory to both stockholders) who might also serve as Chairman of the Board, with the understanding that this individual will be free to decide independently and without limitation, and on the basis of Panagra's being an independent entity, all matters involving Panagra's operations with regard to which the Pan American and Grace directors may be unable to agree. Such an arrangement accomplishes the same purpose as establishing a voting trust along the lines you suggested, while being less complicated and more easily put into effect.

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"For reasons pointed out this morning, the suggestion of Pan American that there be an odd director appointed, who would only have 'power to break any deadlock on any questions arising in connection with operations of the company *that fall within the scope of the dedication of capital made by the two stockholders'* begs the entire question. Grace and Pan American are not in agreement as to what is the proper scope of the company's operations, and fourteen years' experience has shown that such deadlocks as arise almost invariably revolve around this very issue which Pan American Airways wishes to exclude from the jurisdiction of the odd director."*

230

W. R. Grace & Co. has, at all times, been willing to carry out the proposal embodied in the above letter and now reiterates such willingness. W. R. Grace & Co. also offers, if the Board feels its proposal of an independent director may best be accomplished in that form, to enter into a voting trust agreement with Pan American in the precise tenor of the proposed agreement referred to on page 4 of the Opinion, or in such other reasonable form as the Board may deem best suited to accomplish its purpose.

231

Conclusion.

The Board has decided that its power under Section 401(h) of the Civil Aeronautics Act to extend a route "on its own initiative" exists where such extension is a reasonable one. Your petitioner respectfully prays that the Board do now proceed in regular manner to a consideration of the facts to determine whether or not the extension here involved is reasonable or unreasonable.

In view of the fact that the record is so extensive, and the jurisdictional facts are involved and for the most part

* October 28, 1942, Ex. G-75.

232 *Petition of W. R. Grace & Co., for Reargument and Reconsideration.*

coincide closely with the merits, this jurisdictional question should be joined with the merits. This is the accepted practice of the courts in such a situation.*

Your petitioner, therefore, submits that the Board should reverse its order, reinstate the proceeding, and remand the case to the Examiners for briefing and a report on the merits, combining with the merits a consideration of all the jurisdictional facts upon which it will determine whether the Panagra extension is reasonable in the light of all facts and circumstances, and thus within the jurisdiction of the
233 Board.

Dated: June 22, 1944.

Respectfully submitted,

W. R. GRACE & Co.
By W. G. HOLLOWAY
Vice-President.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co.

JOHN T. CAHILL,
234 FRED J. KNAUER,
ELMER J. KELSEY,
WILLIAM F. KENNEDY,
Of Counsel.

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* See, for example, *Cyclopedia of Federal Practice* (2d ed., 1944) §4730; *Flournoy* v. *Wiener*, 321 U. S. 253 (1944); *Semple* v. *Hagar*, 71 U. S. 431, 433-4 (1866), where the court said:

> "But in many cases the question of jurisdiction is so involved with the other questions decided in the case, that this court cannot eliminate it without the examination of a voluminous record, and passing on the whole merits of the case. In such instances, the court will reserve the question of jurisdiction till the case is heard on the final argument on the merits."

In *York County Sav. Bank* v. *Abbot*, 131 Fed. 980 (C. C. Maine, 1904), the court, in deferring the jurisdictional question, said:

> "Not only is this the more convenient practice, but it protects against a hasty adjudication on a summary proceeding with reference to substantial questions." (p. 983)

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Petition of W. R. Grace & Co., for Reargument and Reconsideration. 235

VERIFICATION.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

W. G. HOLLOWAY, being duly sworn, deposes and says: that he is a Vice-President of W. R. Grace & Co.; that he has read and is familiar with the contents of the foregoing petition; that he intends and desires that in considering and acting upon said petition, the Board shall place full and 236
complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; and that, to the best of his information and belief, every statement contained in said petition is true and that no such statement is misleading.

W. G. HOLLOWAY.

Subscribed and sworn to before me this 22d day of June, 1944.

CATHERINE L. PURCELL,
Notary Public.

237

CATHERINE L. PURCELL,
Notary Public.
Kings Co. Clerk's No. 375, Reg. No. 138-P-5.
New York Co. Clerk's No. 323, Reg. No. 228-P-5.
Nassau Co. Clerk's No. 18-P-45.
Commission expires March 30, 1945.

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have this day served the foregoing petition upon all parties who appear of record in this proceeding by causing to be mailed a copy thereof, properly addressed, to the attorneys for each of such parties.

Dated: New York, N. Y., June 22, 1944.

FRED J. KNAUER.

238 **Excerpts from Transcript of Hearings Before Trial Examiners of the Civil Aeronautics Board, September-October 1943.**

Cross examination of Christopher De Groot.

S. M., page 49, line 22 to page 50, line 3 (R. 386-7):

Examiner Brown: Where do you get that figure of 4,800, Mr. Cahill?

Mr. Cahill: 400 per month.

Examiner Brown: I see.

The Witness: In my estimate under Item 20, I have esti-
239 mated that Panagra would carry approximately 3,750 passengers in each direction between Miami and Balboa. That is a number somewhat less than the current figure of Panagra traffic from Balboa south. The figures that I have named in my estimate in Item 20 I consider exceedingly conservative.

Cross examination of Gustavo Vidal.

S. M., page 452, lines 1-10 (R. 796):

Q. Is it possible that some of the capital expenditures estimated in that item might be saved by arranging for
240 joint use of existing facilities? A. I should think it would be possible if the joint facilities could be arranged.

Q. In that case, your investment for equipment would be somewhat smaller? A. Well, presumably we would pay rent in lieu of putting up a building or equipping the station ourselves.

S. M., page 453, line 16 to page 454, line 1 (R. 797-8):

Q. Item 31, Mr. Vidal. Is it your opinion that this additional operation can be undertaken without any increase in general burden expense? A. That is my present opinion on the basis of conversations with Mr. Campbell, Mr. Kirkland, and Mr. Shannon, Mr. Kirkland and Mr. Shannon

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being our vice presidents in South America with headquarters in Lima.

As was brought out in the testimony before, over a period of about six months we increased our frequencies in our present services from four trips a week to seven trips a week, which meant increase in mileage of well over a million miles a year, and we were able to take that in our stride. I think we are in a better position today to add mileage than we were then because we are starting from a higher mileage basis now.

242

Direct examination of Harold J. Roig.

S. M., page 792, lines 5 to 16 (R. 1142):

There is another point—I don't want to be too labored on this, but I think that in a sense we have rather flattered the nature of this service by calling it a connecting service. It is really sort of a shuttle service, sort of a third hinge. Little or none of our traffic originates or is destined to Miami. Not much of it originates or is destined to the Canal. Our traffic goes to various points in the United States which it reaches at Miami. The idea of injecting this shuttle service in between, while it may have served some useful purpose in the early days, has certainly long since been outgrown and it has become just a vermiform appendix.

243

S. M., page 796, line 12 to page 798, line 26 (R. 1146-8):

By Mr. Cahill:

Q. In 1933 Panagra was operating how many route miles, Mr. Roig? A. 4,425.

Q. And in 1942 how many were they operating? A. 8,800.

Q. In 1933, you were operating two round trips a week, were you not? A. Yes.

Q. In 1942? A. Seven and additional trips in some sectors.

Q. During the 10-year period available ton miles were increased by what percent? A. 355 percent.

Q. And ton miles used? A. 680 percent.

Q. What was your commercial revenue in 1933? A. $426,000. 21 percent of our total.

Q. In 1942? A. 4,788,000. 67 percent of the total. An increase of 1,022 percent.

Q. Now, passenger revenue increased what percentage during this period? A. 1,046 percent.

Q. Freight revenue? A. Express and freight revenue,
245 3,160 percent.

Q. Increase? A. Yes.

Q. Now, the company's investment in aircraft equipment and ground facilities in 1933 amounted to $955,000? A. That is right.

Q. In 1942, what did it amount to? A. $3,791,000.

Q. Now, what earnings did the company capitalize during this 10-year period? A. $2,850,000.

Q. And built up a surplus and miscellaneous reserve of? A. $399,000.

Q. And a self— A. And a self-insurance reserve of $1,201,000. Those figures are as of December 31, 1942.

Q. This company began business in 1929 with a million
246 dollar cash capital? A. That is right.

Q. By the end of 1942 it had cash and Government bonds of how much? A. $2,592,000.

Q. Total gross assets of how much? A. $10,754,000.

Q. And a net worth exclusive of goodwill? A. $3,990,000 exclusive of goodwill.

Q. Now, turning to— A. (Interposing) That also, of course, is exclusive of reserves for contingency of $360,000 and the self-insurance reserve which is all in cash or Government bonds of $1,200,000, so that those reserves amounted to over a million and a half.

Q. What is your opinion of this financial record of Panagra, Mr. Roig? A. I will compare it with that of any commercial airline in the United States.

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Excerpts from Transcript of Hearings Before Examiners. 247

Q. And where does it come out on that comparison? In your opinion, that is? A. Taking one thing with another, in my opinion, there isn't any airline that can match it.

Q. And do you think that this financial record is potent on the determination of the question of Panagra's ability to operate the proposed extension? A. I think it shows that we administer our business effectively and that we have the financial strength necessary to undertake the extension.

Direct Examination of Juan T. Trippe.

S. M., page 1738, lines 3 to 12 (R. 2103): 248

Q. If the Board were to order an extension of Pan American Grace's certificate to include an operation between the Canal Zone and Miami, and this should be placed in operation, what would be the effect upon Pan American's service between Miami and the Canal? A. It would be disastrous. In normal times the greater portion of the traffic carried by us on direct flights on our route between Miami and the Canal Zone was traffic destined for or originating at points on the routes of Pan American Grace.

MOTION BY MR. FRIENDLY.

249

S. M., page 3424, lines 2 to 15 (R. 3812):

Mr. Friendly: Yes, Mr. Examiner.

On the first day of this hearing I submitted a motion of Pan American Airways Corporation to dismiss this proceeding for want of jurisdiction on the ground therein stated.

Under date of September 23, 1943, the Civil Aeronautics Board made an order reading that the said motion be and is hereby denied without prejudice to its renewal at the close of the hearing in said proceeding.

I now renew that motion and I further request that that motion be heard and oral argument granted before any date is fixed for the filing of briefs herein.

Examiner Brown: Your motion will be referred to the Board, Mr. Friendly.

250

Exhibit PG-1.

(Furnished by Panagra.)

Item 1. (R. 4238)

Exhibit showing passenger traffic received by PANAGRA at CANAL ZONE. (a) from Pan American, (b) from all others—for the years 1938-1941.

	From Pan American	From all others
1938	459	113
1939	574	160
1940	1,008	236
1941	1,182	467

251

ITEM 3. (R. 4253)

Exhibit showing the number of passengers delivered by PANAGRA at the CANAL ZONE—(a) to PAN AMERICAN, (b) to ALL OTHERS by years (1938 to latest date available).

(for earlier years this data is not available)

	To Pan American	To all others
1938	475	158
1939	632	244
1940	1,117	296
1941	1,607	501

252

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253

Exhibit PG-4.

(Furnished by Panagra.)

Item 5 (R. 4750)

Statistics on Route Miles, Airplane Miles, Passenger and Mail Miles Flown [by Panagra], by Year 1929 to Date.

	Route Miles	Airplane Miles	U. S. Mail Miles	Passenger Miles
	(As at December 31)			
1929	4,463.0	241,217	241,217	395,370
1930	4,501.0	881,529	700,841	1,168,297
1931	4,545.5	1,050,608	943,420	1,824,974
1932	4,551.5	1,144,832	952,459	3,529,308
1933	4,551.5	1,162,394	984,243	4,508,720
1934	4,551.5	1,416,830	947,147	6,350,487
1935	4,497.1	1,447,856	944,873	7,588,288
1936	4,586.1	1,600,580	920,818	9,150,243
1937	5,690.4	1,925,246	967,567	11,095,386
1938	5,666.9	1,540,428	1,033,970	9,037,919
1939	5,666.9	1,318,860	1,036,126	10,015,774
1940	6,096.6	1,641,698	1,306,518	15,259,891
1941	8,221.2	2,684,486	2,260,975	24,598,581
1942 Jan./Nov.	8,551.2	3,636,711	3,088,003	38,664,911

254

255

Item 16 (R. 4811)

REVISED—AUGUST 18, 1943

Estimates of Future Air Traffic (Passenger, Mail and Express) Between United States and South America, Particularly Panagra Countries.

It is estimated that the passenger air traffic between the United States and countries of South America served by Panagra will, for the duration of the war, remain at least at its present level of about 400 passengers a month in each direction.

256 *Exhibit PG-4.*

With additional equipment available and certain government restrictions removed, the flow of traffic should increase considerably.

In view of the hemisphere solidarity and the steady growth in Inter-American commerce, as well as the natural desire of American business to open up new export markets in South America after the war, the post war era will seek a large increase in commercial air travel between the Americas.

After the war, with the resumption of tourist traffic,
257 there will, of course, be a steady growth in passenger traffic.

It is estimated that the current express traffic between the United States and the South American countries served by Panagra, which now averages about 22,000 kilos a month southbound, and 10,000 kilos a month northbound, will steadily increase during the present war and will up to certain point only be limited by the available capacity of present services.

With the resumption of surface transportation after the war, many articles which are now being transported by air may not continue to be shipped in this manner. It is, how-
258 ever, estimated that an express flow of about 15,000 kilos southbound, and 8,000 kilos northbound will remain, and that increased services and capacities, coupled with an increase in normal commerce, will result in a steady increase in air express traffic in both directions between the United States and the countries in South America served by Panagra, as has been the case for many years, even prior to the present emergency.

It is estimated that the present airmail traffic between the United States and the South American countries served by Panagra of approximately 75,000 pounds a year southbound and approximately 40,000 pounds a year northbound wil be maintained for the duration of the war.

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Exhibit PG-4. 259

After that there will be a steady increase in airmail traffic due to the resumption of normal commercial relations and the speeding up of airmail delivery when censorship delays are eliminated.

Items 17 and 18 (R. 4815)

Suggested Schedules Showing Connections at Balboa With Panagra.

PART II—OPERATION WITH DC4 OR EQUIVALENT EQUIPMENT. 260

(Showing Terminal at either Miami or Tampa, and operation of DC4 over entire route between Miami and Lima.)

Daily		75° Meridian Time (EST)	Daily	
12:40		Lv. Tampa Ar.		21:50
	1:30 (2:30 EWT)	Lv. Miami Ar.	21:00	
7:15	7:15	Ar. Balboa Lv.	15:15	15:15
	8:00	Lv. Balboa Ar.	14:35	
	10:10	Ar. Cali Lv.	12:25	
	10:30	Lv. Cali Ar.	12:05	
	12:45	Ar. Guayaquil Lv.	9:50	
	13:05	Lv. Guayaquil Ar.	9:30	
	17:05	Ar. Lima Lv.	5:30	

261

The foregoing southbound schedule assumes that by the time DC4 or equivalent aircraft are made available, general conditions would be such that southbound arrivals at the Canal Zone at dawn or shortly thereafter would be permitted. The northbound schedule could be performed without this assumption providing approximately 24 hour service between New York and Lima. It may also be assumed that when such equipment is available to commercial operators, modified and more rapid schedules in the United States providing close connection at Miami or Tampa with principal cities of the United States could be arranged; and that in peace times, through more flexible customs, immigration, and postal arrangements and equitable agree-

ments with domestic lines, operation of these long range aircraft through to New York or other important interior points in the United States, and handling of customs, immigration and postal procedures at such interior points, could be arranged in order that the speed and ease of travel might keep pace with progress in the development of commercial aircraft.

Even if the Panagra schedules south of Lima remained the same as at present, a 68 hour (elapsed time) service could be maintained between New York and Buenos Aires,
263 as compared with the present 88 hour service by this route. With suitable development of airports and airway aids to permit night flying on the Panagra route, or on portions of it, the schedules south of Lima could readily be modified to reduce this to an elapsed time of less than 48 hours.

Item 20 (R. 4823)

REVISED—JUNE 29, 1943

Estimated Traffic.

DC-4 THROUGH OPERATION BETWEEN MIAMI AND BALBOA

264 (a) Source and character.

Panagra's passenger traffic largely originates in and is destined to the eastern and middle western states. The same thing can be said for express traffic, as well as for the mail carried to and from the countries served by Panagra.

(b) Amount of one-way and round-trip passengers.

It is estimated that Panagra will carry 7200 passengers each year southbound and 5800 passengers each year northbound.

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(c) Mail and express traffic.

It is estimated that Panagra will carry approximately 250,000 pounds of United States mail southbound and approximately 40,000 pounds of mail northbound.

It is expected that Panagra will carry 205,000 pounds of express southbound and 120,000 pounds northbound.

(d) Revenue loads available on suggested route and estimated percentages of use.

DC-4's used on a non-stop run between Miami and Balboa offer an available revenue load of 8112 pounds per trip. It is estimated that 60% of this available payload will be used for revenue purposes. 266

DC-4 Through Operation Tampa to Balboa

(a) Source and character.

Panagra's traffic largely originates in and is destined to the eastern and middle western states.

Inasmuch as the available payload from Tampa to Balboa is approximately 10% less than the payload from Miami to Balboa, the estimated amount of traffic which can be carried on this route with similar equipment is approximately 10% less than that which could be carried from Miami. 267

268 *Exhibit PG-4.*

Item 30, Pages 12-13 (R. 4887-8)

REVISED—AUGUST 27, 1943.

DC-4 Through Operation
Basic Statistics.

(Annual Basis)

	Mileage		Daily
	Route	Round Trip	Round Trip
ROUTES:			
269 Miami/Balboa	.....	.....	.....
Tampa/Balboa	.....	.....	.....
MILEAGE:			
Miami/Balboa	1,150	2,300	839,500
Non Productive—2½%	.....	.....	20,988
			860,488
Tampa/Balboa	1,305	2,610	952,650
Non Productive—2½%	.....	.....	23,816
			976,466
FLYING HOURS:			
Miami/Balboa at 200 MPH	5.75	11.50	4,197
Non Productive—2½%	.....	.....	105
270			4,302
Tampa/Balboa at 200 MPH	6.53	13.05	4,763
Non Productive—2½%	.....	.....	119
			4,882
FLIGHT EQUIPMENT:			
DC-4 Aircraft at $365,000 (hull only)		(1)	$365,000
Engines plus spares (R2000 at $17,500)		(6)	105,000
Propellers plus spares at $4,000		(6)	24,000
Aircraft radio plus spare at $9,000		(2)	18,000
Spare motor mounts at $5,000		(2)	10,000
Spare parts (Miami or Tampa)			120,000
			$642,000

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Exhibit PG-4. 271

		Daily Round Trip	
GROUND EQUIPMENT:			
Station Communication Equipment:			
Miami or Tampa	$35,000		
Camaguey	20,000		
Kingston	20,000		
Puerto Cabezas	20,000		
Barranquilla	17,500	$112,500	
Meteorological Equipment:			
Miami or Tampa	$ 1,000		
Kingston	1,000	2,000	272
Radio Buildings:			
Miami or Tampa	$ 2,000		
Camaguey	2,000		
Kingston	2,000		
Puerto Cabezas	2,000		
Barranquilla	2,000	10,000	
Hangar and Shop Equipment:			
Miami or Tampa	.....	50,000	
Automotive Equipment:			
Miami or Tampa—2 trucks and 3 station wagons		10,000	273
Furniture and Fixtures:			
Miami or Tampa	$ 6,500		
Camaguey	500		
Kingston	500		
Puerto Cabezas	500		
Barranquilla	500	8,500	
		$193,000	
TOTAL INVESTMENT FOR EQUIPMENT		$835,000	

274 *Exhibit PG-4.*

Item 34 (R. 4909-10)

REVISED—JUNE 25, 1943

DC-4 Through Operation
Estimated Annual Revenue and Expenses.

	Tampa/Balboa		Miami/Balboa	
	Amount	Cents Per Revenue Mile	Amount	Cents Per Revenue Mile
REVENUE:				
Passengers	$1,263,200	132.6¢	$1,450,700	172.8¢
Excess Baggage	50,500	5.3	58,000	6.9
Air Express	192,300	20.2	221,100	26.3
Foreign Mail	199,700	20.9	199,700	23.8
275 Total Estimated Revenue	$1,705,700	179.0¢	$1,929,500	229.8¢
EXPENSES:				
Direct Aircraft	$ 655,600	68.8¢	$ 608,200	72.4¢
Depreciation — Flying Equipment	136,500	14.3	136,500	16.3
Ground Expenses—Salaries	361,000	37.9	361,000	43.0
Ground Expenses—Sundries	353,000	37.1	373,900	44.5
Ground Expenses — Depreciation	53,800	5.6	53,800	6.4
	$1,559,900	163.7¢	$1,533,400	182.6¢
Plus 10% for Contingencies	156,000	16.4	153,300	18.3
Total Estimated Expenses	$1,715,900	180.1¢	$1,686,700	200.9¢
Estimated Revenue Over Expenses (before Federal Taxes)	$ *10,200*	*1.1¢*	$ 242,800	28.9¢

276 NOTES: Passenger revenue estimates are based upon the reduced rate between Miami and Balboa which became effective March 3, 1943, which rate is approximately nineteen percent (19%) lower than the previous one. Had the passenger revenue estimate been prepared on the basis of the old rate, the revenue calculations and the estimated revenue over expenses would have been correspondingly higher.

No provision has been included for return on investment or federal taxes theron.

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DC-4 figures have been used for the reason that operating data for this plane is readily available. It is recognized, however, that this type of aircraft may well be obsolete in the light of latest aviation developments. In that event whatever modern and suitable type of four-

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motored flying equipment might be available for this operation should be used. It is believed that the corresponding operating figures would be no less favorable than those submitted herein.

DC-4 Through Operation
Estimated Revenue.

(Annual Basis)

	Daily Round Trip Tampa/Balboa	Daily Round Trip Miami/Balboa
PAYLOAD CALCULATIONS:		
Available payload	7,140 lbs.	8,112 lbs. 278
Mail load reserve (⅓ of Panair's daily mail allotment)	670	670
Available for passengers, express and additional mail	6,470 lbs	7,442 lbs.
Available for express and additional mail (10%)	647	744
Available for passengers	5,823 lbs.	6,698 lbs.
Available seats at 220 lbs. for each passenger and baggage	26	30
PASSENGER REVENUE:		
Available seat miles	24,768,900	25,185,000
Estimated revenue passenger miles (60%)	14,861,340	15,111,000
Passenger tariff ($130) less 15% for discounts and through fares:		
Tampa/Balboa (8.5¢ per passenger mile)	$1,263,214	
Miami/Balboa (9.6¢ per passenger mile)		$1,450,656 279
EXCESS BAGGAGE REVENUE:		
Estimated at 4% of Passenger Revenue	$50,529	$58,026
EXPRESS REVENUE:		
Available for express per trip	647 lbs.	744 lbs.
Available for express per year	472,310 lbs.	543,120 lbs.
Available express pound miles	616,364,550	624,588,000
Estimated express pound miles used (60%)	369,818,730	374,752,800
Express tariff (76¢ per lb.) less 10% for through rates:		
Tampa/Balboa (.052¢ per pound mile)	$192,306	
Miami/Balboa (.059¢ per pound mile)		$221,104
FOREIGN MAIL REVENUE:		
Northbound U. S. Mail from Panagra countries south of Panama-proportion Canal Zone/Miami paid to Panagra (based on July/December, 1942 experience)	$190,000	$190,000
Northbound Panama Mail to United States (based on ⅓ of Panair rate case estimated revenue)	9,700	9,700
	$199,700	$199,700

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Exhibit PG-2.

Minutes of Adjourned Regular Meeting of the Board of Directors of Pan American-Grace Airways, Inc. held at the office of Pan American Airways, Inc., 135 East 42nd Street, New York, N. Y. on the 21st day of September, 1942, at 4:00 o'clock in the afternoon.

Present:

281 Messrs. W. F. Cogswell
A. Garni
H. Preston Morris
R. H. Patchin
G. L. Rihl
Harold J. Roig
J. T. Trippe
E. E. Young

being all of the members of the Board.

Mr. Roig, President, presided. Mr. Cogswell, Secretary, acted as such.

The minutes of the adjourned regular meeting of the
282 Board of Directors held on August 25, 1942 were read and approved.

The President summarized the Orders of the C. A. B. in Dockets Nos. 778 and 779. He pointed out that in Docket 779 we are made a party to the proceeding and recommended that we retain Mr. Gesell as counsel and that the management take such steps as they may deem advisable in the proceeding to the end of obtaining a permanent certificate.

In Docket 778 he recommended that we become a party to the proceeding and apply for a temporary certificate on the basis of three trips per week subject to our commitment to the Air Transport Command.

A general discussion on both proceedings followed, Messrs. Garni, Patchin and Cogswell favoring the recom-

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mendations of the President and Messrs. Trippe, Rihl, Young and Morris being opposed thereto.

After general discussion, the meeting adjourned to 9:30 A. M., September 22, 1942, at the same place.

(sgd.) HAROLD J. ROIG
Chairman

(sgd.) W. F. COGSWELL
Secretary

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Minutes of Adjourned Regular Meeting of the Board of Directors of Pan American-Grace Airways, Inc. held at the office of Pan American Airways, Inc., 135 East 42nd Street, New York, N. Y. on the 22nd day of September, 1942 at 2:30 o'clock in the afternoon.

Present:

Messrs. W. F. COGSWELL
A. GARNI
H. PRESTON MORRIS
R. H. PATCHIN
G. L. RIHL
HAROLD J. ROIG
J. T. TRIPPE
E. E. YOUNG

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being all of the members of the Board.

Mr. Roig, President, presided. Mr. Cogswell, Secretary, acted as such.

Mr. Garni moved the following resolution which was seconded by Mr. Patchin:

RESOLVED that the President of the Company is hereby authorized to retain Counsel to represent the Company in connection with CAB Order Docket No. 779 dated September 10, 1942 and to take all

286 *Exhibit PG-2.*

all necessary action to present to the CAB the Company's position with respect to said order to the end that the CAB authorize and require the amendment to the Company's Certificate of Convenience and Necessity in the manner referred to in said Order, U. S. terminals to be Miami and such other terminal as may be agreed upon between Mr. Roig and Mr. Rihl or, failing such agreement, by the CAB.

Vote being had said resolution failed to pass, Messrs.
287 Roig, Garni, Patchin and Cogswell voting in favor and Messrs. Trippe, Young, Rihl and Morris voting against.

Mr. Young stated that the proposal of the Grace interests that Pan American-Grace should apply for a certificate of convenience and necessity between the Canal Zone and the continental United States had been discussed so often and at such length by the parties that no useful purpose would be served by further extended discussion. However, he desired briefly to state for the record:

1. Pan American-Grace now operates on the west coast of South America and across the Andes. Its only American flag competitor is the Grace Steamship Line, competition
288 for air traffic between the United States and Buenos Aires being nominal. It enjoys end-on connecting services at the Canal Zone furnished by the three trunk lines of Pan American Airways across the Caribbean and through Central America. The best interests of the Company require that its energies should be devoted to the intensive development of this important route, utilizing fully the technical, sales and traffic organizations of Pan American Airways, and that its energies should not be dissipated by attempted extensions into territories already served by Pan American.

2. An extension of the route of Pan American-Grace Airways from the Canal Zone to the United States would

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bring it into direct competition with the routes which Pan American Airways, 50% owner of Pan American-Grace, has operated for more than 13 years and for which it holds a certificate of convenience and necessity, as well as with the northern portion of the route of the Grace Steamship Line. Such a situation would be directly contrary to the public interest, as recently enunciated by the Civil Aeronautics Board, which said that there would be "inherent in such an arrangement, the possibility, where the interests of air and steamship transportation come into conflict, that an impasse would be reached concerning 290
the policies of the joint company which might obstruct or retard its activities and the development of air transportation".

3. Pan American-Grace Airways, in view of its obligations to the War Department and on its own route, has neither the equipment, the personnel nor the facilities required for even a limited twin-engined service between the Canal Zone and the United States. The proposal is therefore wholly academic.

4. The proposal is contrary to the basic agreement 291
between Pan American Airways Corporation and W. R. Grace & Co. under which the two companies associated themselves to form Pan American-Grace. This agreement provided that the Company was to operate "on the route from the Panama Canal to Valparaiso," that Grace was to have an option to acquire an interest therein not to exceed more than 50% of the total capitalization, and that Pan American was to have charge of the operation. A departure from this basic agreement of the two stockholders has not and cannot be made without their agreement, and is outside the appropriate scope of action by the directors.

Mr. Trippe, Mr. Rihl and Mr. Morris concurred in these views.

292 *Exhibit PG-2.*

Mr. Garni then made the following statement in which Messrs. Roig, Patchin and Cogswell concurred:

"I quite agree with Mr. Young's statement that no useful purpose will be served by extended discussion at this time. I will not attempt therefore to state our position fully.

"It does seem to me, however, that the position taken by Messrs. Young, Trippe, Rihl and Morris overlooks the fact that the matter is before this meeting in quite a different light than at any previous time. The CAB has by its Order in Docket 779, made this company a party to a
293 proceeding instituted by the CAB and in our opinion it is plainly the company's duty to appear in this proceeding and present its case from its standpoint as an independent entity. The object of my resolution is to enable the company to do this. The effect of the vote of Messrs. Trippe, Young, Rihl and Morris is to make this impossible. The CAB by its Order in Docket 778 has instituted an investigation of the entire situation in the Caribbean area on the ground that there exists in that area "a serious shortage of transportation facilities due to the war, which may adversely affect the national defense and the relations of the United States with Latin American countries". The Order
294 invites anyone able to do so to apply for temporary certificate to operate in this area to assist in relieving this war emergency. It seems to me that it is the duty of this company to respond to this invitation to the limit of its ability with due regard to its other obligations.

"Commenting seriatim and very briefly on the four points raised by the Pan American Directors, I would merely like to say:

1. The relevancy to the present resolution of the reference to the Grace Line in this and in the next paragraph is not apparent. Competition for air traffic between the United States and Buenos Aires is not nominal and will become increasingly important. Panagra is devoting and will devote its

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energies to the intensive development of its main route as it has in the past. In doing this experience shows that it can count on very little constructive assistance from Pan American Airways. We believe that extension of the company's route to a terminal or terminals in the United States is in no way inconsistent with the development of its present route but is essential to such development; that such extension is in the best interests of the company and in the public interest and that the company should present its position in this regard to the CAB in 296
response to its Orders in Dockets 778, 779 and should offer any services within its power to the CAB to meet the war emergency.

2. There is nothing in the instant situation comparable to that before the CAB in the decision to which Mr. Young refers. The CAB with all the facts before it can determine the principles applicable to the present problem.

3. The statements in this paragraph are incorrect. Mr. Rihl, after a complete study, has stated to this meeting that it is entirely possible for Panagra 297
to undertake, commencing now, three trips per week with a DC-3 airplane between Balboa and Miami. This service, if begun now under the Order in Docket 778 may or may not have to be interrupted later owing to the company's obligations to the Air Transport Command depending on the time when the Air Transport Command is able to make equipment available to the company for this service. It is entirely possible that we may be able to run both services. Our feeling is that in view of the war emergency referred to in No. 778 the company should submit all the facts to the CAB and indicate its willingness to be of such help as it can with due regard to its other obligations and that it should not totally decline

any offer of assistance. As far as No. 779 is concerned that does not in any case contemplate immediate operation and there is no reason whatever to suppose that any Order of the Board issued in this proceeding will not afford ample opportunity to the Company to provide any equipment, personnel and facilities which may be necessary.

4. The proposal is not contrary to any agreement between W. R. Grace & Co. and Pan American Airways Corporation and the matter is not one to
299 be determined by the stockholders of Panagra rather than by its directors. By agreement between W. R. Grace & Co. and Pan American Airways dated February 14, 1939 it is provided that if the Pan American connecting service between Miami and the Canal Zone is at any time inadequate Panagra shall be permitted to apply to the CAB for a certificate to operate this connecting service. Under this agreement the Pan American directors are clearly obligated to vote in favor of the resolution."

Messrs. Trippe, Young, Rihl and Morris dissented from
300 the views expressed by Mr. Garni for the reasons set forth in the above statement made by Mr. Young. Mr. Rihl thereupon moved the following resolution which was seconded by Mr. Young:

WHEREAS, the Civil Aeronautics Board has instituted a proceeding known as Docket No. 779 "to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event a

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terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States;" and

WHEREAS, the Board has made Panagra as well as Pan American Airways, Inc. and W. R. Grace & Co. parties to the said proceeding; and

WHEREAS, half of the capital stock of Panagra is owned by Pan American Airways Corporation and half by W. R. Grace & Co., and four of the directors of Panagra are officers of Pan American and the other four are officers of Grace; and 302

WHEREAS, an amendment of the certificate of public convenience and necessity of Panagra so that Panagra's route should terminate in the United States is favored by Grace and by the four directors of Panagra who are officers of Grace, and is opposed by Pan American and the four directors of Panagra who are officers of Pan American; and

WHEREAS, while in view of the foregoing Panagra as a corporation is not authorized to take any position in the said proceeding, it nevertheless requires the services of counsel, in order that all relevant facts desired by the Civil Aeronautics Board or by the parties to the proceeding may be elicited. 303

NOW, THEREFORE, BE IT

RESOLVED, that

(1) the retainer by Panagra of Gerhard A. Gesell, Esq. of Washington, D. C. (or if he shall be unavailable, such other attorney as may be approved by Harold J. Roig, President, and by either George L. Rihl, Vice President, of Panagra, or E. E. Young, Director of Panagra) to represent Panagra in C.A.B.

304 *Exhibit PG-2.*

Docket No. 779 be and the same hereby is authorized and approved;

(2) the two said officers of Panagra shall jointly request counsel to act and shall inform counsel that the proposed retainer is pursuant to this resolution of the Board of Directors;

(3) counsel shall be instructed that he is not to take any position in respect of the merits of the said proceeding, but that he shall see to it that all relevant information in the possession of Panagra which
305 may be desired by the Civil Aeronautics Board or by the parties to the said proceeding, is made available to the Board and such parties, respectively, under such reasonable limitations as counsel may deem necessary in the interests of Panagra; and that counsel shall report to the said Harold J. Roig and the said George L. Rihl (or in the absence of said George L. Rihl, the said E. E. Young) jointly, shall act only on their joint instructions, and in the event of any difference of opinion between them shall report for instruction to the Board of Directors.

306 Vote being had on the above resolution same was passed. Messrs. Roig, Garni, Patchin and Cogswell in voting in favor of the resolution stated that Mr. Garni's resolution represented their views in the matter but they were voting in favor of Mr. Rihl's resolution in a spirit of compromise and to avoid a deadlock but without any implication from the preambles to said resolution that Panagra is not an independent entity or any implication except for the purpose of this resolution that Panagra should take merely a neutral position in the proceeding.

On motion of Mr. Garni, and seconded by Mr. Patchin, the following resolution was moved:

RESOLVED, that the proper officers of this corporation are hereby authorized to file application pursu-

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ant to Order of the CAB in Docket 778 dated September 10, 1942 for a temporary Certificate of Convenience and Necessity for operation between Miami and Balboa subject to our commitments to the Air Transport Command, under advice to the Air Transport Command, and to retain Counsel and take all steps necessary in the premises; said application to the CAB to contain full statement of our equipment and personnel position with respect to our ATC commitment and to our other services.

308

Vote being had, said resolution failed to pass, Messrs. Roig, Garni, Patchin and Cogswell voting in favor and Messrs. Trippe, Young, Rihl and Morris voting against.

* * * * * *

Mr. Roig made the following statement in which Messrs. Garni, Patchin and Cogswell concurred:

"* * * Mr. Rihl has conceded that we are in a position to begin at once a three times a week service between Miami and Balboa. All I wish to do is to offer that service subject to its termination if and when our other commitments require and to be authorized, subject to this limitation, to endeavor to work out both matters in the best way possible in 309 the light of circumstances as they develop. The questions of public policy involved may well be left to the C.A.B. to whom I would submit a full statement of the facts.

The reasons for the refusal of Messrs. Trippe, Rihl, Young and Morris to authorize this are obviously not those contained in the above statement nor in the preambles of Mr. Rihl's resolution. Pan American is for reasons which are well known and which Mr. Young has briefly outlined unalterably opposed to Panagra's coming to a United States terminal. That is the reason for their resolution preventing Panagra from taking, even temporarily, action to that end. Pan American Airways has always opposed

310 *Exhibit PG-2.*

and will oppose before the C.A.B. Panagra's coming to a United States terminal and its directors are using their positions on this Board to render the Company powerless to defend itself.

Like everyone else in these times, Panagra has many difficult things to do all of which must somehow be done simultaneously. It is the duty of management in time of war to do difficult things and not to seek plausible excuses for avoiding them. Of course, we must maintain and improve our regular service. Of course we must carry out
311 our commitments with the Air Transport Command. But in our opinion we must also do something in response to the C.A.B. Order in Docket 778. Under the Order the C.A.B. for reasons based on the war emergency is seeking temporary services in the Caribbean area. For Panagra to assume a purely negative attitude and make no constructive response to this in view of the vital concern which we have in the matter is, in our opinion, contrary to both the public interest and the best interests of our Company. Whatever the difficulties may be, we believe that the officers should be authorized to endeavor to meet them and that the directors should devote their efforts to seeking ways and means to assist to that end."

312 On motion duly adopted, the meeting was adjourned to 9:30 A.M., September 23, 1942, at the same place.

(sgd) HAROLD J ROIG
Chairman

(sgd) W F COGSWELL
Secretary

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Exhibit PG-2.

313

Minutes of Adjourned Regular Meeting of the Board of Directors of Pan American-Grace Airways, Inc. held at the office of Pan American Airways, Inc., 135 East 42nd Street, New York, N. Y. on the 11th day of November, 1942 at 9:30 o'clock in the forenoon.

Present:

Messrs. W. F. Cogswell
A. Garni
H. P. Morris
R. H. Patchin
G. L. Rihl
H. J. Roig
J. T. Trippe
E. E. Young

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being all of the Board.

Mr. H. J. Roig, President of the corporation, presided.

Mr. W. F. Cogswell, Secretary, acted as Secretary of the meeting.

* * * * * *

315

The President reported on the developments in Dockets 778 and 779 since the last meeting, including the efforts to obtain counsel to represent Panagra pursuant to the limited resolution of the Board. He recommended the employment of counsel to represent Panagra with full power to act for the reasons set forth in substance in letter attached marked Exhibit "A".

Mr. Garni thereupon moved, seconded by Mr. Cogswell, that counsel be retained in Docket 779 in accordance with this recommendation. Vote being had, said resolution failed to pass, Messrs. Roig, Garni, Patchin and Cogswell voting in favor and Messrs. Trippe, Young, Rihl and Morris voting against.

316 *Exhibit PG-2.*

Thereupon, Mr. Trippe moved, seconded by Mr. Rihl, that the officers of Pan American-Grace Airways, Inc. be instructed to retain counsel in accordance with the terms of the resolution which was unanimously adopted at the meeting of September 22, 1942. Vote being had, said resolution failed to pass, memorandum in respect to vote of Messrs. Trippe, Young, Rihl and Morris being hereto annexed marked as Exhibit "B".

There being no further business, the meeting thereupon adjourned.

317 (sgd.) H. J. Roig
Chairman

(sgd.) W. F. Cogswell
Secretary

Exhibit "A" to Minutes of November 11, 1942

W. R. Grace & Co.
7 Hanover Square, New York
November 18, 1942

318 Messrs. H. Preston Morris, Geo. L. Rihl, Juan T. Trippe and Evan E. Young, Directors representing Pan American Airways Corporation on the Board of Pan American-Grace Airways, Inc.

c/o Pan American Airways Corporation
15 Exchange Place
Jersey City, N. J.

Dear Sirs:

Your Memorandum dated November 11th addressed to Messrs. Cogswell, Garni, Patchin and Roig was received on November 13th.

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Exhibit PG-2. 319

This answer is written on behalf of myself and the others above mentioned.

At the meeting on November 11th I stated that I felt that Panagra should have counsel in Docket 779 with broader powers than those authorized by the resolution of the meeting of September 22, 1942 and urged that I be authorized to retain counsel with full powers. In support of my request, I called attention to the following:

1. When the September resolution was adopted it was thought that the parties in Docket 779 would only be those made parties by the Board's Order, 320 namely, Grace, Pan American and Panagra. Since then a considerable number of other air lines have sought to consolidate route applications of theirs in Docket 779 and while the Board has refused consolidation it has permitted intervention of a number of these lines which means that the proceeding will involve not only the matters originally contemplated but the opposition of others besides Pan American to the extension of Panagra's route.

2. Since the adoption of the September resolution, at a meeting with the C. A. B. held on October 28, 1942, Mr. Henry Friendly, counsel for Pan 321 American stated, in Mr. Trippe's presence, that I was always "trotting out" the question of Panagra's having separate counsel; that this was merely a "red herring" and that Panagra did not need counsel in this matter. This seemed to me to indicate that Pan American was not seriously seeking to obtain counsel even under the restricted September resolution.

3. Mr. Gesell, named in the September resolution, was, after the events referred to in Paragraph "1", unable to act owing to his firm's being counsel for the Air Transport Association. He felt there was little of constructive nature which an attorney em-

ployed under the resolution could accomplish in the absence of an agreement between the stockholders that Panagra should take a positive position in the proceeding, and was willing to act as counsel solely because he felt his prior representation of Panagra and his previous relations with the parties placed him under obligation to be of whatever assistance he could in what was clearly a very unusual and difficult situation. Except for these considerations neither he nor his firm would have considered accepting a retainer under the restricted September
323 resolution. Mr. Gesell and not I suggested the firm of Milbank, Tweed & Hope. The retainer was offered to that firm by Messrs. Friendly, Rihl, Roig and Cogswell. They declined to act on the specific ground that under the limitations of the resolution they would not have a real client and could not properly exercise the functions of counsel in the proceeding. In discussing their refusal with Mr. Friendly, he stated to me that he had been thinking of how his firm would react to a similar proposal in these days when good law offices are shorthanded and overworked and that he felt that his firm would probably
324 have taken the same view of it and would not be interested in a retainer of this troublesome character in these days. I stated that these experiences had led me to doubt if any firm of the sort we would want would accept retainer under the restrictions of the September resolution. I never made the other statements regarding my conversation with Mr. Friendly attributed to me in your memorandum.

4. Prior to our seeing the firm of Milbank, Tweed & Hope, Mr. Rihl had suggested and I had agreed that pending the selection of counsel under the resolution, Messrs. Cogswell and Morris should act for Panagra and they appeared for Panagra at the Pre-

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Hearing Conference held on October 30th pursuant to this arrangement. The result, however, of being represented by two counsel who could not agree among themselves had not been satisfactory.

5. Finally, and most important, since the adoption of the September resolution, Pan American has filed a so-called Answer and Petition in Docket 779 in which they launch an attack against Panagra as well as Grace. The attack questions the very standing of Panagra as an air carrier and the Petition requests an investigation by the Board under Section 415 of the Act,—that section by its Terms being the one under which the Board is "empowered to inquire into the management of the business of any air carrier." I stated that, while Grace could defend itself against the attack on it, I felt that, under these circumstances, Panagra should certainly have counsel of its own to defend itself against this attack and to protect its position without any limiting restrictions. With Pan American formally petitioning the C. A. B. to investigate the "management of the business" of Panagra, it seems unthinkable that Panagra should not be permitted to have counsel with the full power and authority necessary adequately to protect its position. I stated further, in effect, that the Pan American directors of Panagra were certainly not at liberty acting as Pan American to attack Panagra's good name and demand an investigation of its management under Section 415 of the Act and then, as Directors of Panagra, to prevent Panagra from obtaining counsel to defend itself against this very attack.

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I stated that in view of all of the foregoing, the September resolution was no longer adequate, even as a compromise solution, to meet the situation as it now existed and

328 *Exhibit PG-2.*

that Panagra should accordingly retain counsel to represent it fully and without restriction. Mr. Garni thereupon offered a motion to this effect which the Grace directors voted in favor of and you voted against.

My views remain as stated above and they are shared by Messrs. Garni, Patchin and Cogswell. We do not feel that any useful purpose would be served by proceeding further under the September resolution. Counsel, even if secured thereunder, would clearly be unable in the present state of the proceedings to act effectively under the restrictions
329 imposed by that Resolution. We feel very strongly that in insisting on proceeding further under the September resolution and refusing, in the light of the existing situation, to permit Panagra to retain counsel to appear generally for it in this proceeding with full and unrestricted authority to represent the Company's interests, you are taking action which is directly prejudicial to Panagra and for which you must assume full individual responsibility.

Very truly yours,

(sgd) HAROLD J. ROIG

330 HAROLD J. ROIG

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Exhibit PG-2.

Exhibit "B" to Minutes of November 11, 1942

PAN AMERICAN AIRWAYS CORPORATION
15 Exchange Place, Jersey City, N. J.

November 11, 1942.

Memorandum to Messrs. Cogswell, Garni, Patchin and Roig—Directors representing W. R. Grace & Co. on the Board of Pan American-Grace Airways, Inc.

332

Dear Sirs:

Just before the conclusion of the Pan American-Grace Airways, Inc. Board meeting this morning, Mr. Garni proposed and Mr. Cogswell seconded a new resolution with respect to the retainer of counsel to represent Pan American-Grace Airways, Inc. in the proceeding now pending before the Civil Aeronautics Board known as Docket 779, to supersede the resolution which was passed by an unanimous vote of all of the directors at the meeting of the Board held on September 22, 1942, a copy of which is attached.* You voted in favor of this new resolution and the undersigned voted against it.

333

Mr. Trippe then moved that the officers of Pan American-Grace be instructed to retain counsel in accordance with the terms of the resolution which was unanimously adopted at the meeting of September 22, 1942. This resolution was seconded by Mr. Rihl. The undersigned voted in favor of this resolution and you voted against it.

Mr. Roig has also stated to various of our officers that he did not intend to take any further action to retain counsel to represent Pan American-Grace Airways, Inc. as directed by the resolution unanimously adopted by the Board of Directors on September 22, 1942.

* Resolution printed *supra*, pp. 100-103.

334 *Exhibit PG-2.*

Particularly in view of certain statements made by Mr. Roig at yesterday's meeting we desire to have the record of the meeting contain this statement of our position in the matter.

The resolution adopted at the meeting of September 22, 1942 called for the retainer of Mr. Gerhard A. Gesell of the firm of Covington, Burling, Rublee, Acheson & Shorb, of Washington, D. C., or such other counsel as might be jointly approved by Mr. Roig and either Mr. Rihl or Mr. Young. Mr. Gesell was entirely willing to act so far as the
335 terms of the resolution were concerned, but felt obliged to decline the retainer because of the appearance in this case of various domestic air lines which were members of the Air Transport Association for which his firm was counsel.

Mr. Roig then suggested the firm of Milbank, Tweed & Hope of New York City, which was approved by Mr. Rihl. This firm felt unable to act. Shortly afterwards Mr. Rihl was obliged to go to South America on important business. Mr. Graham Grosvenor, a director and member of the Executive Committee of Pan American, informed Mr. Roig that he was acting for Mr. Rihl in the latter's absence and
336 requested Mr. Roig to consider the retainer as counsel of another firm which would be approved by Mr. Young. Mr. Roig declined to take any further action pursuant to the unanimous resolution of the Board of Directors of Pan American-Grace, and for that reason at Mr. Roig's suggestion Mr. Cogswell and Mr. Morris appeared at the prehearing conference held on October 30th to act jointly as counsel for Pan American-Grace under the terms of the resolution until such time as outside counsel might be retained.

In our opinion Mr. Roig's position is plainly contrary to the resolution and to his duty as an officer of Pan American-Grace Airways to carry on under a resolution unanimously adopted by its Board of Directors.

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Exhibit PG-2.

The only reasons which Mr. Roig has expressed to us for his refusal to do this are: (1) a claim that he was informed by Mr. Friendly of Root, Clark, Buckner & Ballantine, our counsel, that his firm would not undertake to represent Pan American-Grace under reservations such as those contained in the resolution, and that most of the good firms in New York were so busy that they would not wish to represent Pan American-Grace under existing conditions, and (2) a statement that the answer filed by Pan American Airways under date of October 26, 1942 attacked Pan American-Grace Airways.

We have checked with Mr. Friendly as to his conversations with Mr. Roig. Mr. Friendly states categorically that on no occasion did he say that there was any reason why his firm, if it were otherwise free to act, or any other firm, should feel it improper to accept a retainer under the terms of the resolution in question. The fact that Messrs. Covington, Burling, Rublee, Acheson & Shorb, a firm of the highest standing, which has represented your Company, was willing to act under the resolution except for other disqualifications not relevant here, should remove any argument that the terms of the resolution would make the retainer of outside counsel impracticable. Mr. Friendly recalls stating that the large firms in New York were very busy and that he thought this might have had something to do with the unwillingness of Messrs. Milbank, Tweed & Hope to act. However, the idea that all reputable law firms in New York or Washington are so busy as to make it impossible to find one that would accept a retainer from Pan American-Grace Airways seems to us, as it does to Mr. Friendly, to be preposterous.

On the second point, our answer was not intended, and cannot be fairly be construed, to reflect upon action taken or omitted to be taken by the *officers* of Pan American-Grace in carrying out policies adopted by the *Board of Directors* but rather upon the position of Grace and its directors in determining policies. Moreover, nothing in

340 *Exhibit PG-2.*

the resolution adopted at the meeting of September 22nd could be construed as preventing counsel selected to represent Pan American-Grace Airways, Inc. from presenting any *facts* as to the history of that Company which counsel considered to be relevant, and it would be assumed, of course, that counsel would do this.

Very truly yours,

(sgd) H. Preston Morris
341 (sgd) Geo. L. Rihl
(sgd) J. T. Trippe
(sgd) Evan E. Young

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Pan American Airways Exhibit No. P-2 (Excerpts)

(R. 6390-9)

Total Volume of Passenger Traffic Out of Miami 1929-1942

Outbound from Miami to:-	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942
C Cristobal (1942—Balboa)	1	15	55	54	104	152	168	175	320	401	464	1,241	2,273	6,053
C Panama		1												
S Buenos Aires							18	57	68	69	76	99	512	405

(Prior to July 1, 1941 (except for two months—1940) passenger traffic statistics reflected in this exhibit were compiled on the basis of flight coupons used to stop-over points or division junctions.

Since July 1, 1941, passenger traffic statistics reflected in this exhibit have been compiled to show origin and destination on Pan American Airways, Inc. regardless of stop-overs.)

Total Volume of Passenger Traffic Into Miami 1929-1942

Inbound to Miami from:-	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942
C Cristobal (1942—Balboa)	3	18	64	81	138	173	218	267	362	517	554	1,368	2,315	7,062
C Panama		6	5											
S Buenos Aires							16	81	81	50	72	70	607	621

(Note on Page 3 of this exhibit applicable to above statistics.)*

Total Volume of Passenger Traffic Out of Brownsville 1929-1942

Southbound from Brownsville to:-	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942
C Panama	3	6	3	3	1	2	10	17	54		
C Balboa										1,206	5,875
S Buenos Aires										20	19

(Note on Page 3 of this exhibit applicable to above statistics.)*

Total Volume of Passenger Traffic into Brownsville 1929-1942

Northbound to Brownsville from:-	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942
C Cristobal	15	20	40	63	27	55	39	108	95	243	
C Panama	2	1	3	9	12	14	16	28	56		
C Balboa										495	4,214
S Buenos Aires										5	7

(Note on Page 3 of this exhibit applicable to above statistics.)*

* See note above.

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346 **Pan American Airways Exhibit No. P-14.**

(R. 6427-30)

Witness: R. G. Ferguson

Pounds of Mail Carried Between U. S. and Canal Zone in Both Directions—January 1, 1938-December 31, 1942.

Month	Miami-Canal Zone	Canal Zone-Miami	Brownsville-Canal Zone	Canal Zone-Brownsville
1938:				
January	3,473	2,684	887	326
347 February	3,037	2,585	881	451
March	3,218	2,754	827	523
April	3,557	2,418	752	437
May	3,578	3,172	646	108
June	3,572	2,967	624	64
July	4,020	3,143	600	80
August	3,837	3,024	726	127
September	3,712	2,946	674	103
October	4,314	3,390	764	164
November	3,976	3,285	757	148
December	4,656	3,618	906	94
Total	44,950	35,986	9,044	2,625
348 *1939:*				
January	4,121	4,481	950	289
February	3,800	3,411	790	69
March	4,636	3,958	815	73
April	5,340	4,076	715	294
May	5,225	4,799	706	200
June	4,939	4,166	722	193
July	5,404	4,469	756	186
August	5,384	4,555	761	149
September	5,490	4,385	820	182
October	5,888	4,836	957	175
November	5,695	5,253	949	166
December	7,272	5,432	1,383	274
Total	63,194	53,821	10,324	2,250

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Pan American Airways Exhibit No. P-14. 349

Month	Miami-Canal Zone	Canal Zone-Miami	Brownsville-Canal Zone	Canal Zone-Brownsville
1940:				
January	6,691	4,908	1,002	337
February	5,848	4,826	908	269
March	6,788	5,310	1,089	270
April	6,552	4,943	1,142	311
May	6,441	5,438	1,266	380
June	6,281	5,374	1,234	374
July	8,343	5,739	1,148	416
August	9,183	5,624	1,137	345
September	6,231	5,009	1,086	1,044
October	8,577	5,646	1,139	859
November	7,796	5,295	1,042	684
December	9,235	6,795	1,581	1,204
Total	87,966	64,907	13,774	6,493
1941:				
January	8,953	8,960	1,152	1,138
February	8,142	8,153	1,028	1,243
March	8,653	8,675	1,048	1,462
April	9,554	9,579	924	1,202
May	12,053	12,073	1,022	1,347
June	10,867	10,880	1,163	1,399
July	12,396	9,217	1,181	2,115
August	12,342	8,997	1,472	1,453
September	11,989	8,862	1,394	1,113
October	12,086	9,202	1,914	1,506
November	12,721	9,848	1,961	1,296
December	16,008	11,812	2,098	1,176
Total	135,764	116,258	16,357	16,450

350

351

352 *Pan American Airways Exhibit No. P-14.*

Month	Miami-Canal Zone	Canal Zone-Miami	Brownsville-Canal Zone	Canal Zone-Brownsville
1942:				
January	16,872	12,725	2,009	1,143
February	19,550	16,616	2,960	1,394
March	23,325	23,389	3,737	897
April	26,272	24,601	3,074	221
May	31,389	26,285	2,892	176
June	33,307	26,255	2,790	63
July	35,942	28,162	1,915	59
August	42,844	29,493	1,433	45
353 September	41,691	31,250	1,563	44
October	47,425	34,491	1,531	53
November	47,245	34,480	1,710	46
December	56,947	47,623	2,442	....
Total	422,809	335,370	28,056	4,141

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Pan American Airways Exhibit No. P-14. 355

Tabulation of Pounds of Express Carried from Miami to the Canal Zone and Beyond and from the Canal Zone to Miami During the Period January 1, 1938 through December 31, 1942.

Month	Pounds of Express Carried — Both Directions	Miami to Canal Zone and Beyond	Canal Zone and Beyond to Miami
1938:			
January	3,113	2,646	467
February	8,526	7,077	1,449
March	10,339	8,478	1,861
April	12,057	10,128	1,929
May	12,259	9,930	2,329
June	11,127	9,458	1,669
July	12,124	9,942	2,182
August	15,929	13,221	2,708
September	11,276	9,246	2,030
October	12,978	10,772	2,206
November	15,344	12,429	2,915
December	15,694	13,183	2,511
Total	140,766	116,510	24,256
1939:			
January	12,047	9,879	2,168
February	15,018	12,465	2,553
March	18,184	14,911	3,273
April	16,562	13,415	3,147
May	16,480	13,843	2,637
June	17,222	14,294	2,928
July	14,854	12,180	2,674
August	14,720	12,071	2,649
September	14,975	12,429	2,546
October	14,847	12,175	2,672
November	16,620	13,462	3,158
December	21,621	17,945	3,676
Total	193,150	159,069	34,081

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357

358 *Pan American Airways Exhibit No. P-14.*

Month	Pounds of Express Carried — Both Directions	Miami to Canal Zone and Beyond	Canal Zone and Beyond to Miami
1940:			
January	14,160	11,753	2,407
February	15,956	13,084	2,872
March	19,830	16,459	3,371
April	18,364	14,875	3,489
May	28,233	23,716	4,517
June	21,864	18,147	3,717
July	18,483	15,341	3,142
359 August	18,562	15,221	3,341
September	19,265	15,605	3,660
October	20,223	16,785	3,438
November	21,893	17,952	3,941
December	22,124	18,584	3,540
Total	238,957	197,522	41,435
1941:			
January	22,642	18,793	3,849
February	23,186	19,013	4,173
March	22,982	18,615	4,367
April	21,062	17,692	3,370
360 May	19,683	16,337	3,346
June	18,238	14,773	3,465
July	17,961	14,116	3,845
August	20,208	17,161	3,047
September	18,774	15,143	3,631
October	21,275	18,228	3,047
November	22,257	18,342	3,915
December	21,146	18,095	3,051
Total	249,414	206,308	43,106

Pan American Airways Exhibit No. P-14. 361

Month	Pounds of Express Carried		
	Both Directions	Miami to Canal Zone and Beyond	Canal Zone and Beyond to Miami
1942:			
January	24,164	21,067	3,097
February	27,866	22,339	5,527
March	46,636	40,860	5,776
April	55,204	51,782	3,422
May	59,679	56,350	3,329
June	37,847	33,603	4,244
July	77,126	65,159	11,967
August	36,853	29,293	7,560
September	100,720	93,515	7,205
October	156,869	146,818	10,051
November	136,026	127,552	8,474
December	106,312	97,353	8,959
Total	865,302	785,691	79,611

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NOTE: Statistics on Express carried Brownsville-Canal Zone-Brownsville not available.

363

364

Pan American Airways Exhibit P-37.

(Ordered to be furnished by Pan American pursuant to request of W. R. Grace & Co.)

• • • •

PAN AMERICAN AIRWAYS CORPORATION
BOARD OF DIRECTORS

January 7, 1941.

A discussion thereupon ensued regarding a proposal to have Pan American-Grace Airways, Inc., or another company in which it would be interested, apply for author-
365 ity to operate between New Orleans and the Canal Zone. It was the sense of the meeting that such proposed action should be opposed (P-37, p. 20, R. 7334).

PAN AMERICAN AIRWAYS CORPORATION
EXECUTIVE COMMITTEE

January 14, 1941.

The meeting proceeded to consideration of a proposal made by Mr. Harold J. Roig, of W. R. Grace & Company, that the Corporation should acquiesce in the filing by Pan American-Grace Airways, Inc. of an application for a cer-
366 tificate of convenience and necessity between the Canal Zone and New Orleans, Louisiana, and of a notice of a meeting of the Board of Directors of Pan American-Grace Airways, Inc. which had been called for the afternoon of January 14, 1941, to consider the same matter. Mr. Henry J. Friendly, of Root, Clark, Buckner & Ballantine, counsel for the Corporation, was invited to enter the meeting at this point. Mr. Friendly presented a legal opinion rendered by his firm and participated in the discussion. After full consideration, it was, upon motion duly made and seconded, unanimously

RESOLVED, that the Corporation, as owner of half of the stock of Pan American-Grace Airways, Inc.,

should decline to acquiesce in the filing by Pan American-Grace Airways, Inc. of an application for a certificate of convenience and necessity between the Canal Zone and New Orleans, Louisiana, and that the representatives of the Corporation upon the Board of Directors of Pan American-Grace Airways, Inc. should not attend the meeting of such Board of Directors called for the afternoon of January 14, 1941, to act upon such proposal, or any adjournment thereof, and, except upon further instructions from the Executive Committee or the Board of Directors, should not attend any other meeting of the Board of Directors of Pan American-Grace Airways, Inc. at which action is to be taken upon the subject matter above described. 368

It was further determined that the proper officers of the Corporation should promptly communicate with Mr. Roig, and discuss the matter with him so that the position of the Corporation might be fully understood. A form of letter to be addressed to Mr. Roig, in the event that, after such conversations, he was nevertheless determined to proceed with the meeting of the Board of Directors of Pan American-Grace Airways, Inc., was approved (P-37, pp. 20-21, R. 7334-5). 369

PAN AMERICAN AIRWAYS CORPORATION
BOARD OF DIRECTORS

July 1, 1941.

Mr. Trippe reported to the meeting on developments to date in connection with a proposal submitted by W. R. Grace & Co. relating to an extension of the operations of Pan American-Grace Airways, Inc. from the Canal Zone to New Orleans, and the filing of an application with the Civil Aeronautics Board for a certificate of convenience and necessity on such route. He referred to the special

370 *Pan American Airways Exhibit No. P-37.*

meeting of the Board of Directors of Pan American-Grace Airways, Inc. which had been called for June 18, 1941 to act upon such proposal, and the subsequent adjournments of such meeting. Mr. Trippe pointed out that in January, 1941 a meeting of the Board of Directors of Pan American-Grace Airways, Inc. had been called to act upon the same proposal, and recalled that the Board of Directors of Pan American Airways Corporation, as also its Executive Committee, had determined that the Company should decline to acquiesce in such proposal, and that the Executive Committee had issued instructions to the representa-
371 tives of Pan American Airways Corporation on the Board of Directors of Pan American-Grace Airways, Inc. not to attend any meetings of the Board of Directors of Pan American-Grace Airways, Inc. at which such proposal was to be acted upon. He also stated that, at the request of Pan American Airways Corporation, a special meeting of the stockholders of Pan American-Grace Airways, Inc. had been called to be held on July 2, 1941, at which it was intended that a statement would be submitted on behalf of Pan American Airways Corporation setting forth its position with respect to such proposal, and that it was expected that the representatives of W. R. Grace & Co. at
372 such stockholders' meeting would submit a statement on behalf of that Company respecting such proposal.

At the conclusion of the discussion which ensued, the Board reaffirmed the position which had been previously taken by the Board and the Executive Committee that it would not be in the interest of Pan American Airways Corporation or of Pan American-Grace Airways, Inc., or in the public interest for Pan American Airways Corporation to acquiesce in the proposal.

Upon motion, duly made and seconded, the following resolution was adopted:

> RESOLVED, that the President, or any Vice-President, of this Corporation be, and each of them

hereby is, authorized and empowered, in the name and on behalf of this Corporation and under its corporate seal or otherwise, to execute and deliver a proxy in favor of Geo. L. Rihl, John C. Cooper or J. Clawson Roop, Vice-Presidents of this Corporation, whereby the said Geo. L. Rihl, John C. Cooper or J. Clawson Roop will be authorized to attend a special meeting of the stockholders of Pan American-Grace Airways, Inc. to be held on July 2, 1941, or at any meeting of such stockholders adjourned therefrom, and to vote the shares of stock held by this 374
Corporation in said Pan American-Grace Airways, Inc. at such special meeting to be held on July 2, 1941, and at any meeting adjourned therefrom, and that the Secretary, or any Assistant Secretary, of this Corporation be and each of them hereby is authorized and empowered to affix the seal of this Corporation to such proxy so executed and to attest such seal so affixed (P-37, pp. 21-22, R. 7335-6).

PAN AMERICAN AIRWAYS, INC.
BOARD OF DIRECTORS

December 28, 1938 375

Mr. Trippe reported to the meeting on the status of negotiations with W. R. Grace & Co. It was the sense of the meeting that it would not be in the interest of our stockholders for our directors to authorize an application by Pan American-Grace Airways, Inc. to extend north of Cristobal in competition with Pan American Airways, Inc. (P-37, p. 42, R. 7377).

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W. R. Grace & Co. Exhibit No. G-20.

(R. 5174-7)

Certificate of Incorporation of Pan American-Grace Airways, Inc. (As amended to date) (Excerpt)

FIRST: The name of the corporation is PAN AMERICAN-GRACE AIRWAYS, INC.

SECOND: The principal office of the corporation in the State of Delaware is located at No. 19-21 Dover Green, in the City of Dover, Kent County. The name and address
377 of its resident agent is the United States Corporation Company, No. 19-21 Dover Green, Dover, Delaware.

THIRD: The nature of the business, or objects or purposes proposed to be transacted, promoted, or carried on, are:

(a) To carry, convey, transmit, or transport, as, when and where lawful, goods, freight, express, articles of merchandise of every nature and description, securities, passengers, mails and intelligence by means of air craft.

(b) To design, manufacture, assemble, build, re-
378 pair, maintain, operate, own, lease, let, purchase, sell and deal in air craft of every kind and description, by whatever power actuated and by whatever agency or method sustained or stabilized including (without limitation) balloons, dirigibles, aeroplanes, hydroplanes, hydro-aeroplanes, and all kinds and types of vehicles, mechanisms and devices now known or which may hereafter be discovered or invented for navigating the air, for purposes of pleasure, commerce, warfare or otherwise.

(c) To build, acquire, maintain, own, operate, let, lease, sell and otherwise dispose of air navigation facilities of every nature and description, including

(without limitation) terminal landing fields, emergency landing fields, aviation fields, hangars, land lighthouses, storage space, systems of radio, communications, air craft repair stations, mooring masts, landing buoys, air ports, either land or water, plants, works, stations, depots, and all equipment incidental to the proper maintenance thereof, and all other conveniences and appurtenances appropriate to any of its business.

(d) To design, manufacture, purchase, sell and trade in, and to install upon air craft, weapons and 380
armor or other protective coverings, apparatus for measuring height and distance, determining location and direction, and for signalling or communicating in any way, and all apparatus, equipment and devices designed for use in connection with the navigation of the air.

(e) To conduct experiments on its own account and for others, to apply for, obtain, purchase, or otherwise acquire, patents, licenses, trade marks, trade names, processes, improvements, inventions, formulae, and the like, and to sell, mortgage, pledge, let or otherwise dispose of, or deal in, and to use, 381
exercise and develop, grant licenses and other rights and privileges in respect to, and to experiment upon, test or develop any process, improvement, invention, patent, or patent right, or the like.

(f) To purchase, lease, hire, or otherwise acquire, hold, own, develop, operate, improve, sell, assign, transfer, exchange, mortgage, pledge or otherwise dispose of, or turn to account and convey, and to aid and subscribe toward the acquisition, development or improvement of, real and personal property and rights and privileges therein of every nature whatsoever, whether tangible or intangible in the State of

382 *W. R. Grace & Co. Exhibit No. G-20.*

Delaware, and in all other states, territories, districts, colonies, and dependencies of the United States of America and in all foreign countries, including the good will of any corporation, copartnerships and/or individuals, suitable or convenient for any business of the corporation; and to acquire, take, hold, own, construct, erect, improve, manage, and operate, and to aid and subscribe toward the acquisition, construction or improvement of, buildings, mills, storehouses, warehouses, factories, ma-
383 chinery, apparatus, equipment, locomotives, cars, and other rolling stock, roads, bridges, docks, piers, wharves, ships, vessels, boats, dry and floating docks, marine railways, trucks, wagons, cars, and other vehicles, engines, motors, conveyances, rolling stock and other works, property or appliances which may appertain to or be useful in, the conduct of any business of the corporation but only to the extent authorized by the laws of the State of Delaware.

(g) To acquire by purchase, subscription, or otherwise, and to hold, sell, assign, transfer, exchange, lease, mortgage, pledge, or otherwise dis-
384 pose of, any shares of the capital stock of, or voting trust certificates for any shares of the capital stock of, or any bonds or other securities or evidences of indebtedness issued or created by, this corporation or any other corporation or association organized under the laws of the State of Delaware or of any other state. territory, district, colony or dependency of the United States of America, or under the laws of any foreign country; to pay therefor in cash or property or to issue in exchange therefor shares of the capital stock, bonds or other obligations of this corporation; and, while the owner or holder of any such shares of capital stock, voting trust certificates, bonds or other obligations, to possess and exercise

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in respect thereof any and all rights, powers and privileges of individual holders, including the right to vote on any shares of stock so held or owned (provided, however, that this corporation shall not use its funds or property for the purchase of shares of its own capital stock when such use would cause any impairment of its capital, and provided further that shares of its own capital stock belonging to this corporation shall not be voted upon directly or indirectly); and upon a distribution of the assets or a division of the profits of this corporation, to distribute any such shares of capital stock, voting trust certificates, bonds, or other obligations, or the proceeds thereof, among the stockholders of this corporation. 386

(h) To organize subsidiary corporations and to convey and assign all or any part of the assets to any such subsidiary corporation or corporations in exchange for shares of the capital stock or other securities of such subsidiary corporation or corporations.

(i) To acquire, from time to time, in exchange for shares of the capital stock of this corporation as herein fixed or as may hereafter be increased, such property or shares of the capital stock of any other corporation or corporations, as the Board of Directors shall deem of advantage to this corporation, at such valuation of the property or shares so acquired as in the judgment of said Board of Directors shall be fair and just. 387

(j) To purchase, lease, or otherwise acquire, in whole or in part, the business, good will, rights, franchises, and property of every kind, and to undertake the whole or any part of the assets or liabilities of any person, firm or association or corporation,

engaged in or authorized to conduct any business authorized to be conducted by this corporation, or owning property necessary or suitable for its purposes, and to pay therefor in cash or in stock or bonds, or any other evidences of indebtedness of this corporation or otherwise; to hold or in any manner dispose of the whole or any part of the business, good will, rights, franchises, or property so acquired and to exercise all the powers necessary or incidental to the conduct of such business.

389 (k) To borrow or raise moneys for any of the purposes of this corporation, issue bonds, debentures, notes or other obligations of any nature, or in any manner, for moneys so borrowed, and to secure the payment thereof and of the interest thereon, by mortgage upon, or pledge or conveyance or assignment in trust of, the whole or any part of the property of this corporation, real or personal, including contract rights, whether at the time owned or thereafter acquired, and to sell or pledge such bonds or notes or other obligations of this corporation for its corporate purposes.

390 (l) To aid, in any manner, any corporation or association any of whose shares of stock, bonds, or other evidences of indebtedness are held by or for this corporation, or in which, or in the welfare of which, this corporation shall have any interest, and to do any acts or things designed to protect, preserve, improve or enhance the value of, any such shares of stock, bonds or evidences of indebtedness, or the property of this corporation.

(m) To guarantee the payment of dividends upon any shares of the capital stock of, or the performance of any contract by, any other corporation or association in which, or in the welfare of which, this

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corporation has an interest, and to endorse or otherwise guarantee the payment of the principal and interest, or either, of any bonds, debentures, notes, securities, or other evidences of indebtedness created or issued by any such other corporation or association.

(n) To carry out all or any part of the foregoing objects as principal, factor, agent, contractor, or otherwise, either alone or in conjunction with any person, firm, association or other corporation, and in any part of the world; and in carrying on its 392
business, and for the purpose of attaining or furthering any of its objects, to make and perform such contracts of any kind and description, to do such acts and things, and to exercise any and all such powers, as a natural person could lawfully make, perform, do or exercise.

(o) To remunerate, in cash, shares of stock, bonds, or other securities or evidences of indebtedness or otherwise, any person, firm, syndicate, association, or corporation, for services rendered, directly or indirectly, in selling, placing or guaranteeing the selling or placing of any shares of the 393
capital stock, bonds, debentures, or other securities or evidences of indebtedness, issued, owned or controlled by this corporation or by any other corporation in which this corporation is interested, or in connection with the formation, promotion, or operation of this corporation, or of any other corporation in which this corporation is interested, or in connection with the conduct of the business or affairs or the protection of the property and interests of this corporation.

394 *W. R. Grace & Co. Exhibit No. G-20.*

(p) To conduct its business in all its branches at one or more offices in the State of Delaware and in any or all other states, territories, districts, colonies, and dependencies of the United States of America and in any or all foreign countries.

It is the intention that the objects and purposes specified in the foregoing clauses of this Article THIRD, shall, except where otherwise expressed in this Article, be in no wise limited or restricted by reference to, or inference
395 from, the terms of any other clause of this or any other article in this certificate, but that the objects and purposes specified in each of the clauses of this Article shall be regarded as independent objects and purposes.

It is also the intention that said clauses be construed as powers as well as objects and purposes; and, generally, that the corporation shall be authorized to exercise and enjoy all other powers, rights, and privileges granted by the General Corporation Law, being Chapter 65 of the Revised Statutes, of the State of Delaware, to corporations of this character, as well as all the powers conferred or which may be conferred upon such corporations by the then existing laws of the State of Delaware, so far as not in conflict
396 therewith, or by all laws and acts heretofore or hereafter amendatory of, or supplementary to, said General Corporation Law, or of any or all of said laws or supplements thereto, but the enumeration of certain powers as herein specified is not intended as exclusive of, or as a waiver of, any of the powers, rights, or privileges granted or conferred by said General Corporation Law or the laws of said State now or hereafter in force; * * *

* * * * * *

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W. R. Grace & Co. Exhibit G-22.

(R. 5186)

PAN AMERICAN-GRACE AIRWAYS, INC.

Balance Sheet December 31, 1941

ASSETS

CURRENT ASSETS		
Cash on Hand and on Deposit	$ 406,509.69	
Accounts Receivable:		
Mail Contracts:		398
U. S. Government	575,054.45	
Other Governments	221,855.17	
Other Government Accounts Receivable	101,615.29	
Miscellaneous	16,318.11	
Affiliated and Associated Companies	347,148.48	
Inventories Current	117,774.41	$1,786,275.60
CAPITAL ASSETS		
Airplanes	$1,268,483.89	
Engines	543,211.22	
Hangars, Stations and Airports, etc.	1,420,963.49	
Other Equipment (Flight)	252,847.30	
Construction in Process	109,177.56	$3,594,683.46
		399
Charges Related to Contracts, Leases & Concessions		905,133.75
		$4,499,817.21
SUNDRY ASSETS		
Other Inventories	$ 266,442.98	
Guarantee Deposits	128,484.79	
Prepaid and Deferred Charges	126,516.77	
Cash Reserved for Equipment Purchases	700,000.00	$1,221,444.54
INSURANCE FUND		
U. S. Government Securities	$ 603,349.04	
Cash	323,650.96	$ 927,000.00
TOTAL		$8,434,537.35

400 *W. R. Grace & Co. Exhibit No. G-22.*

LIABILITIES

Current Liabilities

Accounts Payable	$ 556,691.50	
Affiliated and Associated Companies	79,930.75	
Notes Payable	11,049.72	
Reserve for Taxes	566,581.98	
Unearned Passenger Income	180,820.30	$1,401,074.25
Provision for Statutory Compensation of Employees in South America Payable Upon Termination of Employment		$ 196,617.68

401 Reserve for Depreciation and Obsolescence

Airplanes	$ 621,294.89	
Engines	255,137.26	
Hangars, Stations and Airports, Etc.	594,319.55	
Other Equipment (Flight)	135,389.01	
Overhaul Reserve	57,176.56	
Contingencies	240,000.00	$1,903,317.27
Reserve for Contracts, Leases & Concessions		3,123.67
		$1,906,440.94

Reserve for Self-Insured Risks

Balance, January 1, 1941	$ 757,946.64	
Reserved during 1941	188,589.61	
Charges for Losses during 1941	19,601.04	$ 926,935.21

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Net Worth

Capital Stock		$4,000,000.00
Surplus		
As at December 31, 1940	$ 22,788.43	
Profit for Year end. Dec. 31, 1941	680,680.84	
	$ 703,469.27	
Less:		
Transfer to Capital	500,000.00	
	$ 203,469.27	
Less:		
Dividends Paid	200,000.00	3,469.27
		$4,003,469.27
Total		$8,434,537.35

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W. R. Grace & Co. Exhibit G-23.

(R. 5188)

PAN AMERICAN-GRACE AIRWAYS, INC.

Profit and Loss Statement December 31, 1941

INCOME:			
United States		$2,654,084.84	
Foreign Mail	$ 820,488.27		
Less Account U. S. Post Office	476,870.29	343,617.98	
Passengers	$2,105,951.48		
Less Discounts	235,785.81		
Net Passengers		1,870,165.67	
Special Flights		18,571.21	
Baggage		56,934.26	
Express		207,189.40	
Commissions Earned		20,630.76	
Interest Received		6,830.23	
Miscellaneous		105,092.43	
			$5,283,116.78
EXPENSES:			
Aircraft Expense:			
Aircraft Operating		$1,612,744.00	
Depreciation—Flying Equipment		354,411.76	
Ground Expense:			
General		304,490.22	
Traffic		551,910.81	
Operations		708,524.91	
Communications		178,552.81	
Depreciation—Ground Equipment		102,301.43	
Other Expenses:			
Excess Cost DC-4's		120,000.00	
Federal Taxes		549,500.00	
Special Reserve for Development and Contingencies		120,000.00	
			4,602,435.94
PROFIT OR LOSS			$ 680,680.84

406 **W. R. Grace & Co. Exhibit G-75.**

(R. 5507)

October 28, 1942.

L. Welch Pogue, Esq., Chairman,
Civil Aeronautics Board,
Washington, D. C.

Dear Sir:

We wish to confirm our position taken at this morning's conference.

We accept your suggestion in principle and, for the duration of the war, agree to the immediate addition to
407 Panagra's Board of an odd director (satisfactory to both stockholders) who might also serve as Chairman of the Board, with the understanding that this individual will be free to decide independently and without limitation, and on the basis of Panagra's being an independent entity, all matters involving Panagra's operations with regard to which the Pan American and Grace directors may be unable to agree. Such an arrangement accomplishes the same purpose as establishing a voting trust along the lines you suggested, while being less complicated and more easily put into effect.

For reasons pointed out this morning, the suggestion
408 of Pan American that there be an odd director appointed, who would only have "power to break any deadlock on any questions arising in connection with operations of the company *that fall within the scope of the dedication of capital made by the two stockholders*" begs the entire question. Grace and Pan American are not in agreement as to what is the proper scope of the company's operations, and fourteen years' experience has shown that such deadlocks as arise almost invariably revolve around this very issue which Pan American Airways wishes to exclude from the jurisdiction of the odd director.

Very truly yours,

W. R. Grace & Co.
First Vice President.

Copies to:
Pan American Airways Inc.
Pan American Airways Corporation
Henry Friendly, Esq.

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Petition of W. R. Grace & Co. for Review of Orders of the Civil Aeronautics Board. 409

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

W. R. GRACE & Co.,
Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC., 410
Respondents.

Petition of W. R. Grace & Co. for Review of Orders of the Civil Aeronautics Board. 411

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of W. R. Grace & Co. respectfully shows to this Court as follows:

1. This petition, filed under Section 1006 of the Civil Aeronautics Act of 1938 (49 U. S. C. A. §646), seeks a review of (1) an order of the Civil Aeronautics Board issued May 24, 1944, and served upon petitioner May 25, 1944, in the matter of the alteration, amendment and modification of the certificate of public convenience and necessity of Pan American-Grace Airways, Inc. under Section 401(h) of the Civil Aeronautics Act of 1938, as

amended, to provide for a route terminal in the United States (being the Board's Docket No. 779), which order dismissed said proceeding for lack of jurisdiction; (2) an order of the Civil Aeronautics Board dated August 5, 1944, denying the petition for reargument and reconsideration of the foregoing order; and (3) an order of the Civil Aeronautics Board, dated December 17, 1943, denying a cross-motion made by petitioner on December 2, 1943, as hereinafter set forth (par. 5(h)).

413 2. Your petitioner, W. R. Grace & Co., is a corporation duly organized and existing under the laws of the State of Connecticut and having its principal office and place of business at 7 Hanover Square, New York, New York. Petitioner and its predecessors have been engaged in business in Latin America, particularly the countries on the West Coast of South America and in Central America, and in trade and transportation between the United States and Latin America, for nearly a century.

3. Pan American-Grace Airways, Inc. (hereinafter referred to as Panagra) is a corporation duly organized in 1929 and existing under the laws of the State of Del-
414 aware. 50% of its capital stock is owned by your petitioner, W. R. Grace & Co., and the other 50% is owned by Pan American Airways Corporation. Panagra operates, under a certificate of public convenience and necessity issued by the Civil Aeronautics Board, air routes in South America between Balboa, Canal Zone, and Buenos Aires, Argentina, via various intermediate points, principally along the West Coast of South America. The Board of Directors of Panagra consists of eight directors, four of whom are associated with W. R. Grace & Co., and four with Pan American Airways Corporation.

4. Upon information and belief: Pan American Airways Corporation is a corporation duly organized and

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existing under the laws of the State of Delaware, having its principal place of business and executive offices at 135 East 42nd Street, New York, New York. In addition to owning 50% of the capital stock of Panagra, Pan American Airways Corporation also owns all of the capital stock of Pan American Airways, Inc., a company engaged in overseas and foreign air transportation, and further owns all or part of the capital stock of various other subsidiaries operating air routes in Mexico, Central and South America and the Caribbean area. Among other routes, 416
Pan American Airways, Inc. operates between Miami, Florida and Balboa, Canal Zone.

5. The nature of the proceedings before the Civil Aeronautics Board, which resulted in the orders of which review is hereby sought, was as follows:

(a) On September 10, 1942, the Civil Aeronautics Board by its order, Serial No. 1928, instituted this proceeding, Docket No. 779, under Section 401(h) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. A. §481(h)), to determine whether the certificate of public convenience and 417
necessity held by Panagra should be altered, amended and modified so as to extend the route of Panagra from its northern terminal at Balboa, Canal Zone, to a terminal in the United States at Miami or Tampa, Florida, New Orleans, Louisiana, Brownsville or El Paso, Texas, Los Angeles, California, or at two or more of said points. Said order of the Board made Panagra, W. R. Grace & Co., and Pan American Airways, Inc. parties to the proceeding.

(b) By its order, Serial No. 1991, dated October 22, 1942, the Board amended its previous order so as to limit the terminals under consideration to Miami, Tampa and St. Petersburg, Florida.

(c) Pan American Airways Corporation, Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A., and the Department of Justice were permitted to intervene in this proceeding by permission of the Civil Aeronautics Board.

(d) This proceeding came on for hearings before Assistant Chief Examiner Francis W. Brown, and Examiner Vincent Gingerich on September 15, 1943,
419 and said hearings continued from day to day until October 23, 1943. At said hearings W. R. Grace & Co. strongly supported the proposed extension of Panagra, and Pan American Airways Corporation at all times opposed the same. Panagra maintained a neutral position for reasons hereinafter set forth (par. 6 (g)).

(e) At the opening of the hearings on September 15, 1943 Pan American Airways Corporation made a motion to dismiss this proceeding for lack of jurisdiction of the Civil Aeronautics Board. Said motion was denied by the Civil Aeronautics Board by its
420 order, Serial No. 2448, dated September 23, 1943, without prejudice to its renewal at the close of the hearing.

(f) At the close of the hearing on October 23, 1943, Pan American Airways Corporation renewed said motion to dismiss the proceeding for lack of jurisdiction of the Board. The ground of the motion was that the Civil Aeronautics Act did not give the Board any power at all under any circumstances to "require a carrier to operate in a different territory from that specified in its certificate."

(g) On November 24, 1943, the parties were advised by the Board that the Board would hear oral

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argument on the motion of Pan American Airways Corporation to dismiss the proceeding for lack of jurisdiction.

(h) On December 2, 1943, W. R. Grace & Co. filed a cross-motion requesting that argument on the motion of Pan American Airways Corporation be deferred until final argument on the merits, subsequent to the filing of the Examiners' report, on the ground that the motion would involve a consideration of issues of fact which would require a thorough study and briefing of the evidence, as the issues on the jurisdictional facts overlapped the issues on the merits. This cross-motion was denied by the Board's order, Serial No. 2586, dated December 17, 1943.

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(i) Briefs on the motion to dismiss were filed by the parties about January 15, 1944, and oral argument was heard by the Civil Aeronautics Board on January 31, 1944.

(j) The Board handed down its opinion and order, Serial No. 2867, on May 24, 1944, served upon petitioner May 25, 1944, granting the motion of Pan American Airways Corporation to dismiss the proceeding for lack of jurisdiction, and dismissing said proceeding, Docket No. 779. In its opinion, the Board found that Section 401 (h) of the Civil Aeronautics Act did confer upon it the power to amend the certificate of public convenience and necessity of an air carrier so as to require it to extend its route, even though said carrier had not itself filed an application for such route extension. However, the Board went on to find that the particular extension of Panagra's route proposed in this proceeding was beyond its power and jurisdiction for the following reasons: (1) because the extension would involve a

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basic transformation of the character of Panagra in that it would have direct access to a United States terminal, and would no longer be dependent upon Pan American Airways, Inc. for the transportation of traffic between the United States and Balboa, Canal Zone, (2) because of the length of the proposed route extension, approximately 1,200 miles, and (3) because of the amount of the capital investment required for the proposed route extension, approxi-
425 mately $800,000.

(k) On June 23, 1944, W. R. Grace & Co. filed with the Civil Aeronautics Board a petition for reargument and reconsideration of the opinion and order aforesaid. Said petition was filed pursuant to Section 285.8 of the Economic Regulations of the Civil Aeronautics Board, which provides that any party may petition for rehearing, reargument or reconsideration of any final order of the Board within 30 days after service of the order.

(l) On August 5, 1944, the Civil Aeronautics Board issued its order, Serial No. 3049, denying the
426 petition of W. R. Grace & Co. for reargument and reconsideration of the Board's opinion and order dismissing the proceeding. There was no supplemental opinion.

6. Your petitioner has a substantial interest in the orders of the Board, the review of which is sought herein, by virtue of the facts hereinabove and hereinafter set forth:

(a) W. R. Grace & Co. was made a party to this proceeding by the order of the Board.

(b) W. R. Grace & Co. owns 50% of the stock of Panagra. Four of the eight members of the Panagra

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Board of Directors are associated with W. R. Grace & Co. The President, a Vice President, and the Secretary of Panagra are all Vice Presidents of W. R. Grace & Co.

(c) During the six weeks of hearings before the trial examiners, W. R. Grace & Co. presented the complete case for the proposed extension of the Panagra route and vigorously supported the extension. On the argument of Pan American's motion to dismiss for the lack of jurisdiction, W. R. Grace & Co. took the position that the Board had jurisdiction to require the proposed route extension. Over a period of several years W. R. Grace & Co. has expended a substantial amount of money and devoted a considerable amount of time and effort through principal executives to the end of securing the extension of Panagra's route to a United States terminal.

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(d) W. R. Grace & Co. has spent the 16 years since the organization of Panagra and its predecessors in vigorously pushing its growth and development. The Panagra route has expanded from 600 miles to its present route of almost 9,000 miles—an international trunk route serving eight countries and the Canal Zone.

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(e) W. R. Grace & Co. believes not only that the proposed extension of Panagra's route would be financially profitable to Panagra, and thus to its stockholders, but it further believes that if Panagra does not secure a terminal in the United States its traffic, and consequently its financial position, would be very seriously weakened, and the West Coast of South America route to Buenos Aires will not be able to maintain its competitive position with the East Coast route, 100% owned by Pan American

Airways, Inc. and operated direct from a gateway in the United States.

(f) This appeal raises the extremely important question of the interpretation of Section 401(h) of the Civil Aeronautics Act of 1938, as amended, and of the jurisdiction of the Civil Aeronautics Board to amend the certificate of public convenience and necessity of an air carrier so as to require the extension of its route in the public interest when the carrier has
431 not filed an application therefor. This question vitally affects the public interest and the future air service pattern of American flag air carriers and should be passed on by this Court. The opinion and order of the Board, which result in a narrowing and stultifying interpretation of the extent of the Board's jurisdiction under the provisions of the Civil Aeronautics Act, can be reviewed only upon this petition by W. R. Grace & Co.

(g) The "substantial interest" of your petitioner is all the more apparent in this case, inasmuch as Panagra cannot act for itself here. Pan
432 American Airways Corporation, controlling 50% of Panagra's Board of Directors, refuses to permit that company to make an application placing before the Civil Aeronautics Board the question of a United States terminal. Likewise, Pan American has refused to permit Panagra to be represented in this proceeding by independent counsel, free to act on its behalf. Certainly Pan American should not be permitted to continue to profit by its own wrong.

7. Your petitioner respectfully petitions for a review of said orders of the Board under Section 1006 of the Civil Aeronautics Act of 1938, as amended, and that upon such review, the Court set aside such orders and direct the Civil

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Aeronautics Board to reinstate said proceeding, Docket 779, and to proceed further with a consideration of the facts to determine whether or not, under all the facts and circumstances set forth in the record, the extension of Panagra's route involved in this proceeding is reasonable and thus within the jurisdiction of the Board. And for the grounds of said petition, your petitioner respectfully states that on the record and proceedings before the Board and in the decision and final orders set out above, manifest errors occurred to the prejudice of the petitioner, and this petition assigns the following errors:

A. The Board erred in dismissing the proceeding, as the argument upon the motion involved only a preliminary general question of statutory interpretation, upon which the Board found in accord with the contentions of your petitioner.

(1) The Board erred in ruling upon the application of its power to this particular extension, a question not before the Board on the argument of the motion of Pan American Airways Corporation.

(2) The Board erred in deciding the motion upon factual grounds when the motion and the argument thereon was presented as a purely legal question of statutory interpretation, excluding the question of the application of the law to the facts of this particular case.

(3) The Board erred in deciding the motion upon factual grounds as to which the parties had been given no opportunity to be heard, to present briefs, oral arguments and to analyze the extensive record.

B. The Board erred in deciding that as a matter of law, and regardless of the evidence in the record, the pro-

posed Panagra extension was beyond its power and jurisdiction.

(1) The Board erred in deciding upon the facts mentioned in its opinion, that the proposed Panagra extension is *per se* unreasonable and beyond the Board's power.

(2) The Board erred in concluding that it was without jurisdiction to amend Panagra's certificate so as to require the proposed extension of its route
437 to the United States (a) because the character of Panagra would be basically transformed by the proposed extension, (b) because of the length of the proposed extension, and (c) because of the amount of capital investment required for the proposed extension, or on any of these grounds.

(3) The Board erred in concluding that the proposed route extension would constitute such a basic transformation of the character of Panagra as to put the proposed extension beyond the power and jurisdiction of the Board solely because said ex-
438 tension would give Panagra direct access to the United States, and direct connection with United States domestic carriers, and would eliminate Panagra's dependence upon Pan American Airways, Inc. as a connecting carrier.

(4) The Board erred in departing from the principle which it had adopted in this decision as to the scope of and limits upon its power to require route extensions—namely, reasonableness under all the facts and circumstances.

C. The Board erred in taking into consideration, as bearing on its jurisdiction under Section 401(h) of the Civil

Aeronautics Act, any controversy between the co-owners of Panagra.

D. The Board erred in denying the cross-motion of petitioner, made December 2, 1943, to defer argument on the motion to dismiss until final argument on the merits, which cross-motion was made on the ground that a consideration of the evidence in the record was necessary for both.

E. The Board erred in denying the petition of W. R. Grace & Co. for reargument and reconsideration of the Board's decision and order, and in failing to reinstate the proceeding and to direct a presentation of briefs and argument on the jurisdictional facts.

8. This petition could not have been filed within 60 days from the date of service of the original order of the Board dismissing said proceeding, namely, May 25, 1944, inasmuch as the order of the Board denying W. R. Grace & Co.'s petition for reargument and reconsideration was not made until August 5, 1944. Your petitioner had, in effect, been compelled to apply for reargument and reconsideration of the Board's order by virtue of the provision of Section 1006(e) of the Civil Aeronautics Act as amended (49 U. S. C. A. §646(e)) providing that no objection to an order of the Board shall be considered by the Court unless such objection shall have been urged before the Board. The points urged in this petition against the original order of the Board dated May 25, 1944 could not have been made before the Board except by petition for reargument and reconsideration, and they were so made. Your petitioner submits that the 60 days within which this petition must be filed runs from the time of the order denying reargument and reconsideration, rather than from the date of the Board's first order dismissing the proceeding (*Saginaw Broadcasting Co.* v. *Federal C. Com'n*,

96 F. (2d) 554). In any event, your petitioner submits that the facts herein stated constitute reasonable grounds for not filing the petition at an earlier date, and, if necessary, your petitioner respectfully requests leave of this Court to file this petition, all as provided in Section 1006(a) of the Civil Aeronautics Act.

Wherefore, your petitioner prays that said orders of the Civil Aeronautics Board be reviewed by this Court, that a copy of this petition be transmitted to the Board
443 and that a transcript of the record upon which said orders were rendered, be thereupon served and filed by the Board in this Court in accordance with Section 1006(c) of the Civil Aeronautics Act of 1938, that upon such review said orders be set aside by this Court and the proceeding, Docket 779, be reinstated, that the Civil Aeronautics Board be required to proceed therein to consider whether, in the light of the facts and circumstances set forth in the record, the proposed extension is reasonable and thus within the Board's jurisdiction, and that petitioner have such and other further relief as to the Court may seem just and proper in the premises.

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Dated, October 3, 1944.

W. R. Grace & Co.,

By J. T. Kirby,
Vice President.

Wright, Gordon, Zachry, Parlin & Cahill,

By John T. Cahill,
Attorneys for Petitioner,
63 Wall Street,
New York 5, New York.

Petition of W. R. Grace & Co. for Review of Orders of the Civil Aeronautics Board. 445

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

J. T. KIRBY, being duly sworn, deposes and says: That he is a Vice President of W. R. Grace & Co., the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason why this verification 446
is made by deponent and not by the petitioner is that the petitioner is a corporation and deponent is an officer thereof, to wit, a Vice President.

J. T. KIRBY.

Sworn and subscribed to before me, }
this 3rd day of October, 1944. }

CATHERINE L. PURCELL,
Notary Public.
Kings Co. Clerk's No. 375, Reg. No. 138-P-5
New York Co. Clerk's No. 323, Reg. No. 228-P-5 447
Nassau Co. Clerk's No. 18-P-45
Commission expires March 30, 1945

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In the United States Circuit Court of Appeals for the Second Circuit

No. 19520

W. R. GRACE & CO., PETITIONER

v.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA AND PAN AMERICAN-GRACE AIRWAYS, INC., RESPONDENTS

APPENDIX TO BRIEF OF RESPONDENT CIVIL AERONAUTICS BOARD

EXCERPTS FROM TRANSCRIPT OF HEARINGS BEFORE TRIAL EXAMINERS OF THE CIVIL AERONAUTICS BOARD, SEPTEMBER-OCTOBER, 1943

CROSS EXAMINATION OF CHRISTOPHER DE GROOT

S. M., page 107, line 21, to page 108, line 27:

Q. I will rephrase the question. What is the public relations and publicity organization which handles Panagra work?

A. Pan American Airways has an advertising department under Mr. Walker who, in turn, is under Mr. Chenea, and a public relations department under Mr. Van Duzer. Certain advertising and public relations work for Panagra is supposed to be handled by those departments. In Panagra's own name which is handled by Panagra directly by me and there is certain—there are certain public relations functions at times

which are handled directly by Panagra in which case they are handled directly through me.

Q. Panagra has no separate advertising department, as such?

A. Unless you would call it a one-man department.

Q. Meaning yourself?

A. Yes.

Q. Now, Mr. DeGroot——

Mr. FRIENDLY. Mr. Reynolds, I wonder if, in the interest of clarity, it wouldn't be well to have it appear that all these questions that have just been asked refer to activities in the United States. I assume that is clear, but I think the questions have been more generally phrased.

Mr. REYNOLDS. I will put a question to clear that up.

By Mr. REYNOLDS:

Q. Mr. De Groot, does the Panagra organization maintain personnel and carry on its own public relations and publicity work in South America?

A. Yes, it does.

Q. The answer that you gave as to your functions relate only to activities in the United States?

A. That is correct.

S. M., page 132, line 16, to page 132, line 24, and page 133, line 21, to page 134, line 16:

Q. Referring now to the exhibit which has been marked No. P–53 for identification, which we loosely refer to as the embargo letter, I didn't quite understand your testimony yesterday, Mr. DeGroot, upon the necessity for this letter. Did you testify that prior to the issuance of this letter there was an understanding among shippers that an embargo applied to the West Coast?

A. There was an understanding that an embargo applied to all South American air express.

Q. The question is just was this letter sent to the West Coast shippers?

A. This letter was sent to all shippers.

Q. By whom?

A. By Pan American Airways; by Mr. Cholot's office.

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Q. Did Panagra get out such a letter in its own name?

A. Panagra does not act in the United States in connection with the solicitation for handling of express. That is a function taken over by the express department of Pan American Airways.

Q. Did you have anything to do with the drafting of this letter?

A. I did not have anything to do with the drafting of the letter, but I discussed with Mr. Cholot the desirability of the next to the last paragraph.

Q. Did you request that the letter show that it is sent in the name of Pan American-Grace as well as Pan American Airways or not?

A. I don't believe so, because the letter being sent to shippers who, in the first instance, turned their shipments over to the Railway Express Agency in the United States, which, in turn, turns it over to Pan American Airways in Miami, any mention of Panagra at that point would confuse the issue.

S. M., page 138, line 23, to page 140, line 19:

Q. The next exhibit is Item 4 of PG–4, in which you set forth comparison of rates or fares as existing for Panagra operations prior to March 3, 1943, and subsequent to March 3, 1943. Do you have anything to do with setting the new rates and fares? Is that within the scope of your duties?

A. In collaboration with other officials.

Q. When these were made effective—that is, March 3, 1943, was there a general rate structure revision throughout the Pan American Airways operation also?

A. There was a partial revision of Pan American Airways rates at that particular time.

Q. When you prepared these new rates and fares, did you clear them with any of the representatives of Pan American Airways?

A. Yes. As a matter of fact, they collaborated on the calculations of the new fares, because many of them involved connecting fares and in a number of cases there are competitive rates via alternate routes which are partly or wholly under the jurisdiction of Pan American Airways.

Q. Such as the rate from Miami to Buenos Aires——

A. To Buenos Aires.
Q. On either coast?
A. On either coast.
Q. That rate was set the same for either rate?
A. That is correct.
Q. It was set the same for a good many years?
A. That is right.
Q. There was also a competitive rate to a certain extent between Miami and Cali as compared to the Panagra operation and the operation of Avianca.
A. That is correct.
Q. And that was set the same?
A. And that was set the same.
Q. And has so been for many years?
A. Yes.
Q. As a matter of fact, in setting new rates for Panagra, are they always cleared with Pan American Airways, Inc.?
A. Yes.
Q. How do you know that is done?
A. Because of the fact that almost any fare that is quoted in the tariff—I mean fares are quoted from any point on Pan American Airways System to any other point and the rate structure being very closely related, it is only natural that the matter should be discussed with corresponding Pan American Airways officials.
Q. Do you know of any existing objection upon the part of Panagra to clear with Pan American before setting a change in a local rate in a South American operation, between two South American points?
A. If it is a purely South American operation, there would be no particular objection to clear it, but, as a matter of practice, it usually would be done.

CROSS-EXAMINATION OF GUSTAVO VIDAL

S. M., page 463, line 1, to page 463, line 3, and page 463, line 22, to page 463, last line:

Q. You have actually moved your office to the Grace Building in Hanover Square, haven't you?
A. I did in, I believe, February of last year.

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A. The officers of Pan American-Grace Airways, officers and employees of Pan American-Grace Airways, number in the neighborhood of about 35 people.

Mr. FRIENDLY: That is, in New York?

The WITNESS. In New York, and of that number of people I am the only one who has his desk at the offices of one of the parent companies. The other 34 have their offices at the desks of the other parent company.

S. M., page 487, line 13, to page 488, line 16:

Q. Well, Pan American-Grace is in the market for obtaining shipments of platinum from Buenaventura, or was when it operated through that point, was it not?

A. Yes. We were in the market and our rates for the carriage of air express are those established by the air express department of Pan American Airways, and to the best of my knowledge and belief they are the same rates that they use. To that extent we were in the market at those rates.

Q. Now, let's take the rate from Buenaventura to Miami at the time when you operated. Is it your testimony that Pan American-Grace had nothing to say about the air express rate between Buenaventura and Miami?

A. My understanding is that the rates for the entire group of companies, including Panagra, were established by Pan American Airways on a mileage basis. We cooperated with them to the extent of providing them with the data that they may need, and any suggestions and comments that we may have, but in the main I should think that the air express department of Pan American Airways was the guiding fact of establishing the rates.

Q. Did you feel free to go to the express department of Pan American Airways and ask that they enable you to make a change in the rate?

A. I think every time there has been a question of the rate come up I have discussed the matter with the air express department of Pan American Airways, and to the best of my recollection they are very loath to change established rates.

They believe in adhering to tariffs unless there is a reason for change in the whole structure.

I don't believe they are in favor of making exceptions.

S. M., page 579, line 22, to page 580, line 18:

Q. Regarding platinum shipments, a letter dated November 13, 1935, the third paragraph discusses insurance arrangements. Tell us by whom insurance arrangements on such shipments were made, if you know.

A. Insurance arrangements with regard to air express shipments are handled by the Air Express Department of Pan American Airways.

Q. Do you take any part in that?

A. Occasionally. I did in those days. Less frequently now. The points that I discussed either with Pan American Airways or with the underwriters were those that arose in connection with our own problems; but the rates are uniform.

Q. Uniform for what?

A. For both companies.

Q. For the entire Pan American System including Panagra, do you know, or is it just Pan American Airways, Inc., and Panagra?

A. Well, I say that they are uniform for the Latin American services of both companies. There might be some differences in connection with trans-Atlantic, transoceanic services. That I am not aware of.

Q. Those insurance contracts then for Latin American services which apply to Panagra are negotiated and entered into by Pan American?

A. That is right.

CROSS-EXAMINATION OF HAROLD J. ROIG

S. M., page 1104, line 26, to page 1105, line 11:

Q. Panagra doesn't have any established organization or facilities now for selling its own tickets in the United States, has it?

A. No.

Q. Pan American does sell Panagra tickets?

A. Well, directly and indirectly. The Pan American traffic department have complete supervision of all of our ticket sales in the United States. The actual sales are made in part by the Pan American offices, in part by the travel agencies, in part by steamship lines, including the Grace

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Line, and others—the usual outlets for ticket sales, but the matter is all under the general jurisdiction of Pan American's traffic department working in cooperation with Mr. deGroot in the manner which he described when he was on the stand.

S. M., page 1210, line 22, to page 1210, line 26, and page 1211, line 27, to page 1212, line 19:

Q. Pan American still publishes a system timetable, though, including Panagra, does it not?

A. That is right, and part of our fee includes the portion of the expense corresponding to inclusion of Panagra in that timetable.

Q. Just one final question on that subject: You have no objection to the arrangement whereby the timetable does not definitely show where Pan American ends and where Panagra begins?

A. No; beyond the fact that it does show it up at the top of the column there. It says Pan American-Grace Airways, Cristobal-Buenos Aires, on some of these. I think for the purposes of a large compilation, such as the system timetable, that might be considered adequate.

Q. Panagra occasionally has put out publicity in South America, Mr. Roig, has it not, where it mentions the fact of its affiliation with the Pan American Airways System?

A. Oh, yes.

Q. Is that done with your approval?

A. I don't think I have ever objected to it.

Q. Well, do you find a particular advantage in that?

A. Well, at times there may be some advantage. It is a question about which there is room perhaps for some difference of opinion; on the over-all question my own opinion is rather clear.

DIRECT EXAMINATION OF JUAN T. TRIPPE

S.M., page 1731, line 9, to page 1733, line 1:

By Mr. FRIENDLY:

Q. What other specific benefits has Pan American-Grace received as a result of its affiliation with the Pan American Airways System?

A. These benefits are too numerous to mention here except in most general terms, with a few illustrations. In dollars and cents, the most direct benefit has come from Pan American's traffic and sales organization. There are literally hundreds of travel and tourist agencies throughout the United States that act under Pan American's supervision as sales representatives for the Pan American Airways System. These arrangements have been developed by years of effort, these agencies are serviced by a well organized system of district traffic offices, located in the largest travel markets in the country.

The sales organization has given Pan American-Grace equal representation with every other part of the Pan American Airways System and in our judgment deserves a considerable portion of the credit for the financial success of Pan American-Grace's operations. Had Pan American-Grace been an independent airline it could not have had a sales representation anything like what it has received.

I don't see how, for example, its schedules, routes, and tariffs could have been better publicized than through their inclusion in the Pan American System timetables of which over 600,000 have gone out annually for many years, first on a quarterly basis and later on a monthly basis. I will not stop to dwell on the numerous efforts that Pan American's traffic department has made over a long period of time to foster the development of South American air travel, by Around South American tours and the like.

I would, however, like to list some of the techniques and procedures which have been originated by Pan American Airways and passed on to Pan American-Grace as an integral part of the system. They include the development of the combination ticket and exchange order which makes it possible to route traffic between South America and points on the 18 domestic airlines in the United States in addition to points on connecting railroad and steamship lines; the years of work and effort that have been put into the development of its ticket and ticket contract which afforded the maximum protection to which the international air carriers are entitled under the governing international conventions; the development of the valuable business in credit sales under Pan American's credit and

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transportation contracts; the origination and development of a most successful reservation code which now forms the basis of the American Air Traffic Conference Code, and the establishment of the area reservations control system. All these Pan American-Grace has taken full advantage of and properly so. S. M., page 1734, line 8, to page 1736, last line:

By Mr. FRIENDLY:

Q. Will you also briefly summarize and illustrate the benefits which Pan American-Grace has derived from its affiliation with the Pan American Airways System in the technical field such as operations and maintenance?

A. From the very outset the operations of Pan American Airways have served as a practical clinic in the development of international air transportation. Not only has this been so——

Mr. CAHILL: I am awfully sorry and I do apologize, but will you give me that question, please?

(The question was read by the reporter.)

A. (Continuing.) Not only has this been so with respect to the art of aircraft operation itself, but it has been equally true in matters such as maintenance procedures, the development of pilot training techniques, including pioneering in blind flying, the development of training programs for maintenance personnel, and the development and application of radio and meteorology to international aviation, plus many other technical matters too numerous to mention.

That, alone, however, is only half of the story, for, in addition to being an aviation clinic, the system also has been the foremost aviation research laboratory in the air transport industry. We believe, with considerable pride, that through its engineers, Pan American has had much to do with such improvements as the increase in horsepower output of engines, the lowering of fuel consumption, the development of more efficient propellers, the elimination of fire hazards in aircraft and the improvement in aviation fuel and lubricating oils. From all of these research projects Pan American-Grace has benefited.

I have given a general outline of the various technical fields in which Pan American has been able to afford Pan American-

Grace the benefits of its experience and research. I would like to mention, however, a few specific instances of this nature.

They have, of course, occurred from the very time of the organization of the joint west coast operation. When eventually radio facilities were installed on the Pan American-Grace line a good part of the equipment was developed and manufactured by Pan American Airways and with it went trained system radio operators. The system brought to Pan American-Grace the desirability of establishing our procedure for the collection of weather information and we furnished them with their first meteorologist. Afterward, when we had satisfied Pan American-Grace as to the desirability of employing a weather forecaster, he likewise was furnished from our staff.

We developed in connection with the manufacturers the first streamlined loop direction finder and cooperated with Pan American-Grace in the installation of such equipment on its planes. The same is true, I believe, of the system's original development of the gasoline dump valve which has had such an important effect upon provisional loads.

Just as one illustration of the laboratory research work that I have mentioned before, I would like to refer briefly to the studies which we have caused to be made with respect to the subject of flight crew fatigue. This research made by the system medical director, Dr. McFarland, includes investigations of the effects of high altitude operation in the Andes. This resulted in the development of certain techniques for combatting fatigue and keeping fit for flying thus increasing safety in air transport.

We made application of our findings by establishing field medical centers at the main system bases of operation to improve the physical fitness of ground as well as flight personnel. In the development of this medical program and as in many other similar instances, Pan American-Grace has had the opportunity of fully sharing in the benefits to be derived therefrom.

Pan American-Grace now has its own medical center at its base in Lima which is participating in the cooperative system effort of medical research.

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S. M., page 1740, line 9, to page 1743, last line:

Q. I think we have now reached a point where it is appropriate for me to ask you the question which was suggested be deferred yesterday:

To summarize the reasons why Pan American has refused to consent to Grace's request that Pan American-Grace be authorized to apply for an extension of its route north from the Canal.

A. Pan American Airways, as early as 1927, had taken steps to organize an airline from the United States to the Canal Zone, and from the Canal Zone down the West Coast of South America.

A United States airmail contract between the United States and the Canal Zone was awarded the company in July 1928.

Prior to that time the active steps which I have mentioned have been undertaken by Pan American to provide service along the west coast.

This was all some time before there was any arrangement for any possible participation by Grace and Company.

When Grace and Company finally did come into the picture it was only to take a $25,000 participation in a small company which we were to operate in Peru, with an option to buy a half interest in our west coast airline if they decided to do so at a later date.

It was understood that, in the event Grace should decide to exercise their option, our through airline down the west coast was to be under our management, and there was also a definite understanding outlining the territory to be served by the jointly owned company in relation to other parts of Latin America which were either already served or for which plans were under way on the part of Pan American.

In other words, the airline down the west coast of South America was either to be owned 100 percent by Pan American, or in the event Grace exercised its option it would be owned more by Pan American and up to 50 percent by Grace and Company.

In either event it was to be an integral part of the Pan American system under our operating control, just as much so as the line down the east coast of South America, or any other

of the Latin American trunk line services that Pan American Airways system has developed in South America.

The West Coast airline is an end-on carrier to our trans-Caribbean and Central American services. We have no competitive interests against it.

Every through air passenger down the west coast is a passenger carried over the Pan American lines either across the Caribbean or through Central America, and every through passenger coming from the west coast is a through air passenger over our trans-Caribbean or Central American services.

In this respect our trans-Caribbean and Central American services, together with the west coast service, provide a through Pan American system air service to west coast points and via the west coast to Buenos Aires, just as our service down the east coast of South America provides a through Pan American system air service to east coast points and via the east coast to Buenos Aires, except that Grace, having exercised its option, acquired as our partner on the west coast a 50-percent interest in the profits or losses of that sector.

Grace's suggestion that this west coast line of the Pan American system in which they are given the opportunity to acquire 50 percent of the stock be now made a competitor to Pan American Airways is, in our view, a breach of the agreement between the two companies, which was first made in 1928, and which was reaffirmed in 1929.

If this company, in which Grace has had an option to purchase up to 50 percent were to be extended to Miami the company originally created to serve as our end-on connection for our Miami-Canal Zone service would become the means of destroying that service, at least so far as through traffic to the West Coast of South America is concerned, and thereafter Pan American-Grace Airways would not be part of the Pan American Airways system as it was set up to be, and which it has been all these years, but would be an air line competing with Pan American.

In this respect the effect on Pan American Airways of what is proposed here is quite different from that of the proposal that a competitive outside air line be authorized to fly between

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the United States and the Canal Zone, or even down the West Coast.

Under such a situation Pan American-Grace would continue to be a part, and a most important part, of the Pan American system.

The issue, therefore, as we see it, is not simply whether Pan American-Grace Airways should be allowed to fly between the Canal Zone and Miami in competition with Pan American, but also whether our west coast line now operated by Pan American-Grace Airways should be separated from the system, and Pan American would thereafter be deprived of the benefits of its end-on connection to west coast points which Pan American itself had under way before any arrangement with Grace, and which Pan American-Grace was organized to provide when Grace took up its option.

For these reasons, our directors have felt that the interests of our 9,000 stockholders in every state in the Union would be so prejudiced by this proposal of Grace that we were bound to oppose it in every way.

CROSS-EXAMINATION OF JUAN T. TRIPPE

S. M., page 2159, line 10, to page 2162, line 12:

Q. Your board passes on all purchases of flying equipment, for instance; is that correct?

A. Our company serves as the purchasing agent for the entire system.

For instance, we buy for various of the divisions and we buy also for Pan American-Grace, flight equipment and spare parts—things of that kind—and those contracts represent corporate commitments of the Pan American Airways, Inc., or Corp. usually.

Sometimes they are large enough to require the vendors to get a separate commitment from Corp. on top of Inc. covering the purchase.

Q. As a surety arrangement?

A. As a surety arrangement, yes; and that has been the practice over the years, and as a result both the Pan American-Grace board usually confirm the purchase and the actual com-

mitment is made by Pan American Airways, Inc., with the outside vendor.

Q. Let's take through the typical purchase of say costly equipment. First the matter comes to the Pan American-Grace board, and, assuming that both ownership interests are in agreement, it is approved in such a board meeting.

Then it goes to the board of Pan American Airways, Inc., for approval, and if the item involves the necessity of additional surety or security it goes to the board of Corp. for approval; is that correct?

A. Well, the actual purchase is in the name of Inc. If there is a guarantee by Pan American-Grace, usually the purchase is made without action by the Pan American Airways, Inc., board, unless it has to do with some type of equipment which is usually the case where there has been a purchase on a pooling basis, with the benefit being passed along to all parties concerned in the procurement.

Q. In that case it would go to all three boards, and then the order would be placed?

A. I only recall one or two instances over the years where the manufacturers have asked for formal action by Corp. It is usually only in specific instances, where the commitment runs to a great many millions of dollars, such as the purchase of Constellations—I have that particularly in mind.

Q. How about the DC-4's?

A. I don't think that was covered by the Corp. guarantee.

Q. When all of the boards—or the two boards, if that is all that is necessary in the particular instance—have acted, then isn't the practice to refer the matter to Pan American's Manufacturing and Supply Corporation for the actual placing of the order?

A. Yes. That company functions as an agency, the purpose being to avoid taxes.

In many instances it is necessary to have the purchasing company qualified in the particular state in which the purchase is made, and that company having only a nominal outstanding capital there is a saving to the system of a substantial amount.

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That company functions purely as a vehicle. There is no board action separately by its board, I believe, the board of that company being the executive committee of the system.

Q. The executive committee of Corp. and of Inc.——

A. Yes.

Q. (Continuing.) And Supply all being the same; is that right?

A. That is right.

Mr. FRIENDLY: Mr. Reynolds, I think you inadvertently used the wrong name. It was not the Pan American Aviation and Supply Corporation; it was the company known as Pan American Sales Corporation.

Mr. REYNOLDS: That is right. I am entirely in error, and I shall correct my questions and assume that your answers will be.

The WITNESS: That is correct.

By Mr. REYNOLDS:

Q. The Sales Corporation, however, does or has received commissions of some sort on the purchase of equipment for Panagra. What is the nature of that arrangement, Mr. Trippe?

A. I don't believe there have been any commissions. That is a service rendered as part of our general system service.

If commissions were earned they were included, of course, in the general fees.

Q. In the management fees?

A. In the management fees. I think that the procurement company, and in fact all other agency companies, are departments of the system functioning without profit so far as Pan American-Grace is concerned, in just the same way as they would for other units of the system.

S. M., page 2236, line 17, to page 2236, line 28:

Q. Now, referring to another matter: you came to an understanding early in Panagra's history, did you not, Mr. Trippe, that Panagra would clear with Pan American all mail, passenger, and express rates, so that there would be as few discrepancies as possible between the rate structure of the entire

Pan American system, and you had definite correspondence on that, did you not, Mr. Trippe?

A. I don't recall any incident to which you refer. It is a fact that Pan American, I think, is the nominee of Pan American-Grace that actually files rate tariffs with the Civil Aeronautics Board. I understood that that arrangement is in effect; yes.

REDIRECT EXAMINATION OF JUAN T. TRIPPE

S. M., page 2714, line 15, to page 2715, line 18:

By Mr. FRIENDLY:

Q. Mr. Trippe, was the original participation by the Pan American Airways System in the DC–4 project under a contract made between various air lines and the Douglas Aircraft Company in 1936?

A. That is right. The contract was entered into between Pan American Supply Corporation, Eastern Air, and United, American Airlines, and TWA, all five lines, and the Douglas Company.

Q. That contract called for the production of an experimental ship by the Douglas Company?

A. It did. The contract was entered into, I believe, in 1936 and the ship was developed and flown in the spring of 1939, and it proved unsatisfactory. There was a sum approximating $100,000 which was made up and paid to Douglas by the several air lines, the Pan American System contribution being broken down 5/7 by Pan American Airways and 2/7 by Pan American-Grace Airways.

Q. After the experimental ship was turned down by the air lines, there were various restrictions in the engineering by the Douglas Company; is that correct?

A. That is correct, and Pan American Airways began negotiating for the purchase independent of the other domestic air lines with the Douglas Company in the late fall of 1939.

Q. And then in the spring of 1940 did Pan American enter into a contract with the Douglas Aircraft Company for three DC–4's with an option to acquire three more, the option exercisable by July?

A. That is correct.

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Q. Now, of those six airplanes, three were intended for Pan American-Grace; is that right?

A. That is correct.

DIRECT EXAMINATION OF RICHARD C. LOUNSBURY

S. M., page 2874, line 11, to page 2875, line 17:

By Mr. FRIENDLY:

Q. Does the exhibit which has been marked P-205 correctly summarize your qualifications, experience, and duties?

A. Yes, sir.

Q. Referring to some of the matters that are mentioned in Exhibit P-205 and first to the matters of tariffs, will you please explain what your duties are in connection with the issuance of the tariffs of Pan American-Grace Airways?

A. Of course, the decision as to the actual rates to be charged rests with Pan American-Grace Airways. However, I act as tariff filing and publishing agent with the Civil Aeronautics Board. We also publish the local tariffs and charges throughout the territory covered by the Pan American Airways System. The regulations connected with the tariff, we likewise publish and file with the concurrence of Pan American-Grace.

Q. Now, turning to the subject of the compilation and publication of schedules: Would you indicate what you do with respect to Pan American-Grace?

A. Upon receiving Pan American-Grace's proposed schedules, we handle the mechanical preparation of the schedules for filing with the Civil Aeronautics Board in the Post Office and their publication in the system timetable.

Q. Is it correct to state that ordinarily suggestions for changes in Pan American-Grace schedules do not originate in your office?

A. That is correct. The actual schedule changes are worked out by the officials of Pan American-Grace who send the schedules to us for publication and filing. In some instances, these schedules are such that they affect connecting services of Pan American. If that is the case, the schedules of both companies are discussed with a view to arriving at a satisfactory solution commensurate with the circumstances.

S. M., page 3138, line 14, to page 3139, line 12:

By Mr. KNAUER:

Q. Did you contact various travel bureaus and travel agencies?

A. That is right, I did.

Q. And did you discuss Panagra's service down the west coast with them?

A. Yes; I explained to them all about Panagra's service.

Q. Did you find any of them that hadn't heard the name of Panagra before?

A. Quite a few of them. I would say a majority.

Q. Would you say that the majority were unaware of Panagra's service down the west coast of South America—Buenos Aires, for example?

A. The term "Panagra." They knew there was a service, but they thought it was all Pan American.

Examiner BROWN: They knew there was a service?

The WITNESS: Yes.

Examiner BROWN: They were fully aware of the availability of air service down the west coast?

The WITNESS: Yes; that is right.

Examiner BROWN: But just didn't know it as of Panagra?

The WITNESS: That is right.

Mr. CAHILL: They thought it was Pan American, as I understood the rest of his answer.

The WITNESS: That is right.

Mr. CAHILL: They thought it was all Pan American?

The WITNESS: That is right.

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EXHIBIT P-34

(Furnished by Pan American)

Page 46

AUGUST 31, 1928.

AVIATION CORPORATION OF THE AMERICAS,
100 East 42nd Street,
New York City.

Attention: Mr. J. T. Trippe.

DEAR SIRS:

This will confirm arrangement under which we will associate for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chilce.

A corporation will be formed under the laws of Delaware with a capital stock of $50,000, of which $25,000 will be subscribed by yourselves and $25,000 by ourselves. This corporation will pay to Huff-Daland Dusters, Inc. the sum of $15,000 for an assignment which will convey all of the rights of that company under its present Peruvian mail contract and concession. As soon as possible after the assignment has been completed, operations will be started by this company in Peru and every effort will be made to put the business there on a paying basis.

We will in the meantime cooperate with you in studying the costs of operation on the route from the Panama Canal to Valparaiso and also the advisability of requesting the U. S. post Office Department to advertise for a mail contract on such route and the terms of such advertisement.

If you determine that it is advisable to bid on a contract for carrying the mails between the Panama Canal and Valparaiso, the Delaware corporation above referred to will be used in such service either by an increase in its capital stock to an amount sufficient to operate on the whole route or as a subsidiary operating in Peru. In either event our subscriptions to the stock of the Delaware Company shall be credited at their full amount in the capital set-up of the corporation operating the through service. We shall also have a reasonable time after a study of the estimated costs of such operation to determine what interest, if any, we will take in the company making the bid in addition to our initial investment

of $25,000, such interest not to exceed, however, more than fifty percent of the total capitalization.

You will have charge of the operation of the service from the Canal to Valparaiso and our houses on the West Coast of South America will be the agents of the company on a reasonable compensation basis, such agency to continue during the life of transportation contracts undertaken by the company.

The details of carrying out the above must, of course, be worked out as we go along. We believe, however, that we have stated broadly the basis of our understanding.

Very truly yours,
W. R. GRACE & Co.,
Assistant Secretary.

WFC: GVB.

CORRESPONDENCE

Letter of C. Edward Leasure, Chief Examiner.

DECEMBER 17, 1943.

Mr. H. PRESTON MORRIS,
58th Floor, 135 E. 42nd St., New York, N. Y.
Mr. WILLIAM F. COGSWELL,
7 Hanover Square, New York, N. Y.
Mr. JOHN T. CAHILL,
63 Wall Street, New York, N. Y.
Mr. H. N. DEYO,
64 Water Street, New York, N. Y.
Mr. HENRY J. FRIENDLY,
31 Nassau Street, New York, N. Y.
Mr. E. SMYTHE GAMBRELL,
Citizens & Southern Nat'l Bank Bldg, Atlanta, Ga.
Mr. WILLIAM I. DENNING,
Investment Building, Washington, D. C.
Mr. EDWARD BIERMA,
15 Broad Street, New York, N. Y.
Mr. H. R. BOLANDER, Jr.,
Chicago and Southern Air Lines, Municipal Airport, Memphis, Tenn.
Mr. A. C. WIPRUD,
2736 Dept. of Justice, Washington, D. C.

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Re: Docket No. 779

GENTLEMEN:

As you have been advised, the Board has determined to hear oral argument on the motion of Pan American Airways Corporation to dismiss the proceeding in Docket No. 779, known as the Panagra Terminal Investigation, for want of jurisdiction. On December 3, 1943, W. R. Grace & Company filed a "cross motion" urging the Board to "defer Oral argument on and consideration of the motion of Pan American Airways Corporation to dismiss this proceeding for want of jurisdiction until final argument upon the merits, subsequent to the filing of the Examiners' report." This motion was denied by the Board's order of December 17, 1943.

The oral argument has been assigned for January 31, 1944, in the offices of the Board at 10 a. m. The time and order of presentation of arguments have been assigned as follows: Pan American, 1 hour; Eastern Air Lines, 30 minutes; National Airlines, 10 minutes; Chicago and Southern Air Lines, 10 minutes; W. R. Grace & Company, 1 hour; and Public Counsel, 1 hour. Counsel for Pan American may reserve a portion of his time for rebuttal.

At the suggestion of counsel, the Board will receive briefs on this question in order to facilitate a presentation of authorities and such detailed facts as may be necessary and in order to restrict the time required for the oral presentation. These briefs will be due January 15, 1944, and should not exceed 50 pages.

Very truly yours,

C. EDWARD LEASURE,
Chief Examiner.

C. E. Leasure, 12/17/43,
Office Trial Examiners.
CC: Docket Section
Mails & Files
Mr. Brown.

Letter of Wright, Gordon, Zachry, Parlin & Cahill.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL
(Cotton, Franklin, Wright & Gordon)
SIXTY-THREE WALL STREET
New York 5
JANUARY 4, 1944.

Re: Panagra Route Extension
Docket No. 779

DEAR SIRS:

We are in receipt of a copy of a letter of Mr. Gambrell, counsel for Eastern Airlines, dated December 27, 1943.

Mr. Gambrell lists five points which he intends to brief and argue in support of Eastern's motion to dismiss this proceeding.

Points 1 and 5 raised by Mr. Gambrell obviously do not raise any question of the Board's jurisdiction, but involve only the issue as to whether the Board, granting that it has jurisdiction, should amend Panagra's certificate so as to provide for the extension of the route. Inasmuch as the Board has denied the cross motion of W. R. Grace & Co. to join the argument on the jurisdiction question with the argument on the merits, we believe it is clear that argument on Points 1 and 5 listed by Mr. Gambrell have no proper place in the argument now scheduled by the Board.

Point 4 raised by Mr. Gambrell relates solely to the application of Section 408 of the Civil Aeronautics Act in this proceeding. While this does raise in part a question of law, it is an entirely different question from the question as to whether the Board has jurisdiction to order the route extension. Inasmuch as we have not been advised by the Board that the issue of the application of Section 408 is to be considered at this time, we assume that this issue is likewise not properly brought before the Board on this pending argument.

Point 2 involves no question of jurisdiction of the Board, but solely a matter of its discretion, which the Board has, we believe, already conclusively determined.

This leaves only the third point raised in the letter. Even this fails to correctly state the issue now to be argued before

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the Board. The question is not whether the Board lacks power to grant a new route to Panagra for which it has not applied, but rather whether the Board has the power to amend Panagra's certificate so as to provide for the extension of its route from the Canal Zone to a terminal in Florida.

We believe it to be in the interests of proper and expeditious procedure that the issue before the Board on the argument now set for January 31, 1944, be so defined that irrelevant and extraneous considerations such as those raised in Mr. Gambrell's letter will not be brought into the argument and the briefs. This should be done well in advance of the time set for the filing of briefs.

Respectfully yours,

(S) WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co.

CIVIL AERONAUTICS BOARD,
Commerce Building,
Washington 25, D. C.

(CC to all parties.)

NOTICE OF ORAL ARGUMENT

UNITED STATES OF AMERCIA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Docket No. 779

PAN AMERICAN-GRACE AIRWAYS, INC.

NOTICE OF ORAL ARGUMENT

In the matter of the alteration, amendment, and modification of the certificate of public convenience and necessity of Pan American-Grace Airways, Inc., under section 401 (h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.

Notice is hereby given, pursuant to the Civil Aeronautics Act of 1938, as amended, particularly sections 401 and 1001 of said Act, in the above-entitled proceeding, that oral argument on the motion of Pan American Airways Corporation to dismiss the proceeding for want of jurisdiction is assigned to be

held on January 31, 1944, at 10:00 a. m. (eastern war time) in Room 5042, Commerce Building, 14th Street and Constitution Avenue, N. W., Washington, D. C., before the Board.

By the Civil Aeronautics Board:

Dated Washington, D. C., January 10, 1944.

[SEAL] FRED A. TOOMBS,
Secretary.

EXCERPTS FROM GRACE'S BRIEF BEFORE THE CIVIL AERONAUTICS BOARD ON MOTION TO DISMISS, DATED JANUARY 15, 1944, PAGES 34 TO 39, INCLUSIVE

D. The amendment proposed in this case is reasonable

The following facts, taken from the Record in Docket 779 amply demonstrate the reasonableness of an exercise by the Board of its power to "require" Panagra to come through to a Florida terminal.

1. Panagra's Existing Service

Panagra's growth and expansion over the ten-year period 1933 to 1942 effectively demonstrate not only that it is able to undertake additional service without difficulty, but also that the proposed extension is merely a further development in Panagra's natural growth. The following is a brief summary of this development (795–9; Ex. PG–4, Item 5):

	1933	1942
Route Miles	4,581.3	8,581.2.
Airplane Miles	1,102,394	4,093,194.
Passenger Miles	4,806,720	48,538,646.
Frequencies	Twice weekly	Daily (plus additional trips).
Commercial Revenue	$420,000	$4,788,000.
Investment in Aircraft & Ground Facilities	$955,000	$3,791,000.

During this period, the following additional increases are reflected:

Average ton miles	355%
Used ton miles	680%
Passenger revenue	1040%
Express & freight revenue	3160%

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2. Pan American's Traffic on the Miami-Canal Zone Route

The proposed service is on a route on which there already is extremely heavy traffic, with unlimited possibilities of further development. This is apparent from the following statistics on the volume of passenger traffic, mail and express on the Miami-Canal Zone route as operated by Pan American during the years 1940–42 (Exs. P–2; P–14):

SOUTHBOUND

Year	Total passengers carried	Pounds of mail	Pounds of express
1940	1,241	87,986	197,822
1941	2,273	135,764	206,308
1942	6,068	422,809	788,691

NORTHBOUND

1940	1,366	64,907	41,435
1941	2,316	116,388	43,106
1942	7,062	335,370	79,611

3. Extent of Proposed Service

The proposed service is not over a new and uncharted course where unknown navigational, meteorological and other problems might be encountered. It is, as has previously been mentioned, but one stop beyond Panagra's present terminal, involving largely an over-water operation.

The additional mileage represents an increase, on a through operation * between Florida and the Canal Zone, of 1,150 miles (Ex. PG–4, Item 30, p. 12).** This is by no means a formidable addition for a carrier whose route miles have increased from

* This refers to a non-stop operation between Florida and the Canal Zone with DC–4's or other available equipment of that type. DC–4 statistics were used in the exhibits. Ex. PG–4, Item 34, page 3 states, however, that "whatever modern and suitable type of four-motored flying equipment might be available for this operation should be used. It is believed that the corresponding operating figures would be no less favorable than those submitted herein."

** Unless otherwise indicated, all statistics given relate to a terminal at Miami, Florida. Corersponding figures for Tampa will be found in the exhibits.

4,463 in 1929 to over 8,800 in 1943. As previously illustrated, *supra*, pp. 9–10, the character of the proposed operation and not solely the mileage involved is important.

The exhibits are based upon a proposed daily service, which is the same frequency as Panagra now operates on its international trunk route.

4. Expenditure Required

With respect to the expense attendant upon the projected service, the exhibits show (Ex. PG–4, Item 30, pp. 12–13 and Item 34) that the total investment for equipment will amount to $835,000. In connection with this estimated expense, the following facts are significant to note:

(1) The estimates given are of course based upon the high price level prevailing in 1943.

(2) Some of the estimated capital expenditures (e. g., for communications equipment) might be reduced by joint facilities arrangements (452).

(3) The relatively small amount involved is attributable to the fact that there will be fewer stations per route mile on the proposed extension than on the present operations, namely, only one in Florida, and one in Kingston (on the DC–3 operation only), with some possible additional expenditures at Balboa (1461).

5. Financial Condition of Panagra

Panagra is in a strong position to undertake this estimated expenditure. Comparing the financial record of Panagra with any commercial airline in the United States, it is such, in the opinion of the President of the company, that "there is not any airline that can match it" (798).

As of the end of 1942 the company had cash and Government bonds of $2,592,000, total gross assets of $10,754,000 and a net worth, exclusive of goodwill, of $3,900,000. During the ten-year period 1933 to 1942 the company capitalized the sum of $2,850,000 and built up a miscellaneous reserve of $399,000 and a self-insurance reserve of $1,201,000 (796–8; cf. Exs. G–22, G–23).

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The relatively small amount of the capital expenditure required for the permanent operation between Florida and the Canal ($835,000) is apparent when compared with these figures. Moreover, it is less than half the estimated operating revenue for one year.

6. Estimated Revenue, Expenses, and Return Expected

The secure position of the company from a financial standpoint and the estimate of expected revenue from the proposed operation, demonstrate the absurdity of any argument that an order requiring the extension would be a deprivation of property in violation of the due-process clause.

The estimates of Panagra's Vice President and Comptroller envisage an annual revenue of $1,929,500 on the basis of daily service with DC–4's between Miami and Balboa. The estimated annual operating expenses are $1,686,700.

This results in an estimated operating profit, before United States mail but including revenue for the carriage of foreign mail northbound, in the amount of $242,800 * (PG–4, Item 34, p. 3). Of course, the rates which Panagra would receive for carrying southbound mail (including any subsidy) will be determined by the Board. In accordance with established practice, however, such rates would be fixed at a point which would cover Federal taxes and a return on the investment, as well as any possible deficit from operations.

These estimates of revenue to be derived by Panagra on the suggested route are supported by conservative estimates of the passenger, mail, and express traffic to be carried by Panagra (49–50; Ex. PG–4, Items 16 and 20).

As a result of the remarkable growth of Panagra during the past ten years or so, it is the opinion of the operations executives of Panagra that the company is in a better position today than ever before to add more mileage, because it is starting from a higher basis and with a larger organization, with the result that the proposed service will cause no increase in the general and burden expenses of operations (453–4; 601–2).

* On the DC–3 operation from Miami, the estimated operating profit is $37,100. If the operation were from Tampa, instead of Miami, there would be an operating deficit of $10,200 (DC–4 operation) and $181,300 (temporary DC–3 operation).

7. Advantages to the Public

Over 75% of Panagra's passengers carried south from the Canal Zone are received from Pan American at the Canal and approximately the same percentage of those brought to the Canal northbound are transferred to Pan American's respective divisions for carriage to destinations in the United States (Ex. PG–1, Items 1 and 3).

Numerous advantages will accrue to these passengers from an extension of Panagra's route to a Florida terminal.

The advantage of the speedier service on the DC–4 operation which would carry through passengers to Lima from Miami in seventeen hours is, of course, obvious. Under the proposed schedule, the Panagra plane would leave Miami at 00:00, arrive in Balboa at 7:15 and be in Lima at 17:05 (PG–4, Items 17–18).

The manifold advantages from the point of view of passenger comfort and convenience on a through service have been abundantly developed in the record. They include:

(a) Fundamentally, and without stating at length the serious inadequacies of Pan American's connecting service, it would relieve the traveling public of all the disadvantages that inhere in any connecting service and would facilitate and improve the services between the United States and the eight important South American countries on Panagra's route (e. g., a number of delays in arrival are inevitable, being caused by weather, motor trouble, and other factors). Such delays are an inherent defect of a connecting service (223). Apart from the difficulties caused by Pan American's numerous delays (Exs. P–25, P–25A, P–25B), even Panagra delays are proof of the advantages of a Panagra direct through service (792).

(b) It would eliminate passenger discomfort and inconvenience on a night flying operation. A connecting service would require passengers to arise some time before the arrival at Balboa, and transfer from one aircraft to another, instead of continuing the trip as on a

through operation, either asleep or awake, as the passengers might choose (175–6).

(c) Panagra rather than Pan American would control reservations on the Canal Zone-Florida sector, thus preventing international through passengers from being blocked out by local sector traffic (804).

(d) The competition provided by the extension would result in improved service generally, as illustrated by the expedition of Pan American's passenger handling at Brownsville since the advent of the competition of American Airlines on the Mexico service (400).

In addition to these advantages to the traveling public, there would be the following advantages to Panagra itself:

(a) A through service would make possible a *maintenance base* in the United States, nearer and more accessible to the source of supply of skilled labor and of materials and parts—providing an item of economy through the elimination of heavy inventory, rush shipments, etc. Further savings could be obtained on customs duties. It would enable the technical staff to be in closer contact with other experts in the U. S. on special problems that arise in the course of operations (177–8).

(b) It would assist in the procurement of skilled pilots who would be attracted by the possibility of an occasional layover in the United States (177–8).

(c) It would make for a more economical *utilization of equipment* (356–7).

(d) It would result in a *generation of traffic* because of the elements of increased capacity and frequency and of competition (440–1). The fact that transportation via Panagra could be sold on a through basis would also be helpful in the generation of traffic (399–400).

(e) It would facilitate *freight service*. The fewer transfers of freight, the more efficient and less expensive the service becomes. Every time cargo has to be handled the package problem becomes serious and the expeditious character of the service is retarded (806).

Excerpts From Oral Argument Before the Civil Aeronautics Board on Motion to Dismiss, January 31, 1944

Statement by Hon. L. Welch Pogue, Chairman of the Civil Aeronautics Board

S. M., page 2, paragraph 2:

Mr. Pogue: The Board will now hear oral argument on the motion of Pan American Airways Corporation to dismiss for want of jurisdiction the proceeding in Docket No. 779, Panagra Terminal investigation.

Argument by Mr. Harlan (Eastern)

S. M., page 33, paragraph 1, through page 34, paragraph 1:

Mr. Harlan: Mr. Chairman and members of the Board, I am obviously not going to be able to cover all of the points in our argument in 30 minutes and I am going to try not to repeat anything which Mr. Friendly has said, although I agree with practically everything he has said at least, so I just call your attention to our brief in which I think we have outlined in substance practically all of the arguments that we care to make in this proceeding.

The basic question has already been set out by Mr. Friendly, namely, whether Section 401 (h) of the Act gives the Board power to require an air carrier, against its will, to operate a substantial new service—in this case practically 1,200 miles of new route—in a territory which it has never served and which it does not wish to serve.

Public Counsel has suggested in his brief that we should discuss purely the legal question here and not refer to the facts at all.

Now, I don't think that this Board can decide a question of this character in a vacuum. There is no court that I know of that has ever decided a case without reference to the facts, and I think we have to refer to the facts in order to get the legal question in proper perspective.

The question here is whether you are going to dismiss this proceeding, not whether you are going to dismiss some other

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proceeding some time or all proceedings of this type, but just whether you are going to dismiss this particular proceeding, Docket 779, so I think it is necessary to look at the facts.

Just reviewing them briefly so far as we think they are particularly significant: Panagra is equally owned by Pan American and Grace. It operates up and down the West Coast of South America, and to Buenos Aires which is a point on Pan American's route. Pan American is the sole United States operator between the United States and South America; Grace is a large corporation having many interests, one of which is Grace Line, Incorporated, which is a steamship operator between New York, the Canal Zone, and the West Coast of South America.

S. M., page 41, paragraph 1:

I think in this case it seems clear that there is no power in this Board at all to compel Panagra to provide service which it does not wish to provide. Hence it seems to me that it is wholly irrelevant to try to decide whether the particular exercise in this case would be reasonable or not, but even if the rule of reasonableness were relevant in this proceeding—which I think it is not because the Board just lacks the power to do it—would it be reasonable to compel Pan American, for instance, to invest its money in Panagra, just so Panagra can compete with Pan American all the way from Miami to Buenos Aires, and if the question of unwillingness were involved, would it be reasonable to compel Grace to invest in an airline which would compete with it all the way from Miami down the West Coast of South America? Would it be reasonable to require a 1,200-mile extension, or a 1,200-mile new route by a carrier which admittedly cannot operate satisfactorily on its present route, or would it be reasonable to add 1,200 miles of new route to any system by compulsion?

S. M., page 43, paragraph 2:

Now, it seems to me it is quite apparent that the Florida-Canal Zone route is, in effect, a new route, and a very substantial route.

S. M., page 62, paragraph 8, through page 68, line 1:

Mr. CAHILL: May it please the Board, in opening the argument on behalf of W. R. Grace & Co., I should like to refer to certain of the basic facts in regard to Panagra.

Panagra presently holds a certificate of public convenience and necessity for the carriage of persons, property, and mail between Balboa in the Canal Zone and Buenos Aires, via the West Coast of South America. Its present route mileage is approximately 8,800 miles.

The instant proceeding involves an extension of approximately 1,150 route miles. That is less than 1/7 of the existing route mileage.

Now, turning for just a moment to the growth of Panagra, the following few figures indicate the extent of Panagra's growth during the 10-year period from 1933 through 1942.

Panagra's route mileage has practically doubled. Its airplane mileage has quadrupled. Its passenger mileage has increased 10-fold. Its frequency has increased from twice a week to 7 times a week, plus additional trips. Its commercial revenue has increased more than 10 times and its investment in aircraft and ground facilities has increased four times.

In addition Panagra's passenger revenue has increased more than 10 times. Its express and freight revenues have increased almost 30 times.

Since the year 1942 Panagra's growth and development has continued at even a greater pace. Just taking a few of the statistics of Panagra, comparing 1943 with 1942, its plane miles in 1943 were 4,700,000, an increase of practically 700,000 over 1942; its passenger miles in 1943, 57½ million miles, an increase of 13½ million over the year before. Passengers carried in '43, 69,000, an increase of 13,000 within the year.

Pounds of express in 1943, 2,000,000, an increase of 607,000 pounds within the year. In mail, 280,000 pounds in 43, an increase of practically 40,000 pounds, and in personnel 2,500 employees in 1943; 1,600 employees in 1942.

From those few statistics, cold though they are, the Board will see that Panagra's development over the past decade has continued apace, and that this proposed extension would not

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be a sudden and staggering expansion to a carrier which has maintained a static position over a period of years. It would be on the contrary but the natural growth of Panagra, which has grown, as I have said, apace over the years.

Now, taking again just a few figures on the financial aspects of this proposed extension: the total investment for equipment, assuming DC–4 operation, is only $835,000. Most of this will be for flight equipment, which Panagra would be able to use anywhere.

Now, that figure of $835,000 is insignificant when we consider these few figures: Panagra, as of 1942, had cash and Government bonds of over two and a half million dollars, total gross assets of $10,750,000, net worth, exclusive of good will, of practically four million dollars. This capital expenditure of $835,000 is less than half the estimated operating revenue of the extension for one year, without United States mail pay, and it is less than four times the estimated annual return on DC–4 operation. Hence the total capital investment about which we are talking will be made up in less than four years.

The estimated annual expenses on this DC–4 operation would be approximately a million six hundred thousand dollars. There would, therefore, be an estimated annual return of approximately a quarter of a million dollars before United States mail pay.

Now, I should like to take up, from the factual aspect, those features of the proposed extension which I think show clearly its character as not being a new route. Under the proposed permanent operation of this extension, with four-engined equipment, the flights will be made nonstop between the Canal Zone and the United States, thus the bringing of this American Flag carrier to its home country will add only one stop to a carrier that now has 35 stops on its route, and even with temporary DC–3 operation, this extension would add only one additional refuelling stop.

Now, the mileage here is not a significant factor. When counsel attempts to compare it with the route of Eastern or the route of United on the West Coast, counsel leaves out of account the fact that this route is almost entirely over water. The flight is much simpler from technical and operation points

of view than many other Panagra operations, and the purpose of this proposed extension is to more adequately serve the existing traffic on the present Panagra line. It is undisputed here that in the period 1938 through 1942 over 75 percent of Panagra's passengers carried south from the Canal Zone were received from Pan American at the Canal, and in the same period approximately the same percentage brought to the Canal northbound were transferred to Pan American's various divisions for carriage to the United States.

Now, there is an interesting parallel in a previous proceeding before this Board, and I refer to the New Orleans route case. There Pan American sought an amendment. It wanted to extend its route from Guatemala City to New Orleans and to provide a route between New Orleans and Balboa via Havana.

Now, at that time and under those circumstances, this is how Pan American described its application, and I quote a sentence: "The application of Pan American proposes not the inauguration of a new route in the usual sense but rather an extension and improvement of the existing service or that carrier," and continuing, the brief says, and I quote: "It will be seen that about half of the route distance involved in the proposed New Orleans-Central America-Canal Zone operation is already a part of the operations of Pan American, and that every terminal and intermediate point on the route involved in this proceeding, except only the City of New Orleans itself, is now served by that carrier.

"The purpose of the present application is, therefore, not to inaugurate a new route in the usual sense, but by opening the New Orleans Gateway to improve Pan American's existing service to Central America and the Canal Zone," and counsel in his oral argument in that case, on behalf of Pan American, referred to the service proposed, and I quote: "as a rather modest change in the air transport map."

For Panagra here, carrying through the analogy, the granting of a Florida terminal will amount to no more than an extension and an improvement of its existing service, and to paraphrase the Pan American position, that this proposed service will not involve the granting of a new route but the opening of a terminal or gateway.

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Now, treating of the alleged unwillingness of Panagra from the factual side, that is one of the fundamental grounds of the Pan American motion to dismiss. Panagra is not unwilling in the sense that it is resisting this proposed amendment. W. R. Grace & Co. owns 50 percent of the stock of Panagra, and directors representing W. R. Grace & Co.'s stock interest have urged for years, that Panagra be permitted to apply for a United States terminal.

Now, it is true the members of the Panagra management were not allowed upon this trial to testify in their official capacity, but they were permitted to testify in their individual capacity, and they testified, to a man, in favor of the proposed extension.

Now, Panagra, let the fact be clear, has made no application for a United States terminal, solely because its other 50-percent stockholder, Pan American Airways, has consistently refused to permit such application. Pan American, the record here discloses, even went to the extent of instructing its representatives on the Panagra Board not to attend Panagra directors' meetings. Pan American itself called a Panagra stockholders meeting to consider an application for a United States terminal, and it stayed away from that, too.

Now, the reason, among others, for Pan American's refusal to permit the second largest American-flag carrier abroad to come to the United States is that the extension would not be in the best interests of Pan American. Pan American is here trying to take advantage of a situation created by its own hostility to Panagra's interests.

S. M., page 84, paragraph 3, through page 85, paragraph 1:

Now, the best answer as to how far the Board may go, I think, is found in the Board's own decisions, of which I will make mention only of three. The first of these has to do with the extension of the route of Continental Air Lines beyond Wichita, its original terminal, to Tulsa. The mileage of this end-on extension was one-third of Continental's existing route mileage.

The second of these three had to do with a change of Pan American's route from New York to Lisbon, so as to double its previous route mileage.

The third and last is again Pan American, an extension of Pan American's route from Manila to Singapore, of almost 1,500 miles.

Now, both on the absolute and on the relative side, the extension in this case is smaller than others previously granted by the Board, and it is no answer to those cases to say that they involve voluntary extensions, because no distinction is drawn in 401 (h) between the Board's power to amend in a voluntary and the Board's power to amend in a compulsory extension. The power to amend is the same, regardless of how it is invoked by the petition of the carrier, on complaint to the Board, or on the Board's own motion.

The only restriction is to be found in the standard of the public interest, and in the restriction contained in the Constitution, which we have summarized in the words that it must be a reasonable extension.

S. M., page 92, paragraph 1, sentence 2:

It is elementary that no one can attack the constitutionality of a statute or of a regulation which does not inflict injury upon him.

S. M., page 93, paragraph 5:

Now, there is no reason in principle why a common carrier should not be compelled to render more adequate service to its existing traffic, and here the traffic is 75 percent, even though it is thereby required to step outside the confines of its previous territory.

S. M., page 95, first two sentences:

All of those regulations involve concepts more drastic than the one we are here considering. Here the carrier is merely required to render more adequate service to its existing traffic by extending its route, and there is every reason to believe that the extension will prove to be a profitable one.

ARGUMENT BY MR. WANNER, PUBLIC COUNSEL

S. M., page 137, paragraph 5, through page 138:

Mr. WARNER: Mr. Wanner, the subject of jurisdiction has so far been argued in very broad terms with little reference to the fact of this particular case. I wondered whether you felt

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that there was anything in the facts of this case that set it aside jurisdictionally from what might be a more typical instance, the more typical instance perhaps being that a more active unwillingness as compared with a perhaps passive unwillingness that results in this case from an internal deadlock?

Mr. WANNER: As I have stated, I am not particularly prepared to talk on that, for the reason that it involves an examination of the entire transcript, and there are many implications to be drawn from the transcript and from the record. However, it seems to me that the case—I mean obviously from general knowledge of the record, having assisted in the trial of it, I know that it is different from perhaps the ordinary case of compulsory extension that would arise. For instnce, it would be different from the attempt to extend northwest from Chicago to New York because the class of traffic carried here between the United States and the West Coast of South America is so predominantly United States traffic, the carrier was formed for the carriage of mail from the United States to those points by means of its very close affiliate, Pan American Airways.

The charters of Panagra obtained from some of the South American countries referred to service between the United States and the West Coast of South America, and all the scheduling and even the advertising in this country and in South America, all the facts in the case show that it is considerably different from the usual case in which you might take one carrier and try to extend him into a territory which he had to some extent incidentally been drawing from.

Mr. WARNER: The facts you mention are facts of the route rather than the internal constitution of the carrier. I take it that your answer to my question would be that you do not feel that the jurisdictional issue is affected by the peculiar division of ownership and the relation between owners?

Mr. WANNER: Not particularly. The fact that Panagra is nonwilling, is to me just the same as though it were definitely unwilling. That is, the fact is that it is not willing in this case although it happens to be a 50–50 proportion.

REBUTTAL ARGUMENT BY MR. HARLAN (EASTERN)

S. M., page 150, paragraph 2, to page 151, paragraph 2:

Mr. HARLAN: Now another point, which has been made is that the ordinary dictionary definition of the word "amend" is adequate to cover the proposed new service here under consideration. Now, I submit—Mr. Cahill, I believe, said that no one disputed that. I submit that there is a dispute on that and if Mr. Cahill will read our brief on pages 17 and 20, he will discover that there is a dispute. We have taken the same definition which the others have used here to the effect that an amendment is a change which does not change the identity or the character of the thing which has been changed. Now, I submit that the ordinary man in the street would not agree offhand that a 12000 mile new route between the Canal Zone and the United States is a mere amendment of Panagra's existing route. I think that Grace itself has taken the position that that is substantially more than an amendment.

On page 18 of our brief, we have quoted from Grace's petition which was the occasion for the inauguration of this proceeding, in which Grace said that the new route between the Canal Zone and the United States "would give the Panagra route the standing of an independent American international air line with a terminal in the United States," and I submit that is a statement on the part of Grace to the effect that the character of Panagra would be changed by reason of this proposed extension and I don't believe that Grace can take the position that this is a mere extension and improvement of its existing service, and then turn around on the other hand and argue that this change is necessary in order to give Panagra an independent status which it does not now have, because I believe that does change decidedly the character and identity of Panagra, at least under the allegations made by Grace.

REBUTTAL ARGUMENT BY MR. FRIENDLY (PAN AMERICAN)

S. M., page 164, last line, to page 166, paragraph 1:

Mr. FRIENDLY: There has been talk about 8,800 miles of route of Pan American-Grace in South America which is true enough if you understand that it includes all the paralleling

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mileage, for example, the sawtooth across Bolivia is counted twice, and that actually the distance between the termini is 3,844 miles.

The company has grown but it is not unique in that.

Then, various reasons are marshaled why it is not a new route. A certain deep significance appears to be given to the fact that it is over water. Well, I wonder whether Los Angeles-Honolulu is not a new route for TWA. There not only is there no stop, but there is no place where you could stop, and yet it seems to me that that is a new route on any ordinary meaning of the words. It is about twice as long as this, but I can't imagine that is the test. If 1,200 miles is not a new route, then, why not 2,400 miles? Then, the purpose is said to be more adequately to serve the existing traffic, and it is said that over 75 percent of Panagra's passengers carried south from the Canal were received from Pan American. That again is approximately a true statement if you listen to it closely, but in listening to it, you have to bear down on that word "from." "Carried south from the Canal," not "carried south of the Canal," because you see, actually the through passengers carried from the Canal have always been a comparatively small part of Pan American-Grace's passengers. Then, something is said about the New Orleans case. I have already pointed out that that was not a 401 (h) application, and as to what I said as to that not being an ordinary new route, I think there is the obvious distinction that Pan American had been engaged in serving the trade between the United States and the Canal Zone for 14 years out of these other gateways to the east and west, whereas that is a trade which Pan American-Grace has never served.

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Correspondence between the Civil Aeronautics Board and Parties.

Letter of Chief Examiner Leasure.

(R.* 8846-D, E)

CIVIL AERONAUTICS BOARD

WASHINGTON

(SEAL)

December 17, 1943

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Chicago and Southern Air Lines
Municipal Airport
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Mr. A. C. Wiprud
2736 Dept. of Justice
Washington, D. C.

Re: Docket No. 779.

Gentlemen:

As you have been advised, the Board has determined to hear oral argument on the motion of Pan American Airways Corporation to dismiss the proceeding in Docket No. 779, known as the Panagra Terminal Investigation, for want of jurisdiction. On December 3, 1943, W. R. Grace & Company

* "R." refers to the pages of the record filed with this Court as renumbered by the Civil Aeronautics Board.

filed a "cross motion" urging the Board to "defer oral argument on and consideration of the motion of Pan American Airways Corporation to dismiss this proceeding for want of jurisdiction until final argument upon the merits, subsequent to the filing of the Examiner's report". This motion was denied by the Board's order of December 17, 1943.

The oral argument has been assigned for January 31, 1944, in the officers of the Board at 10 a. m. The time and order of presentation of arguments have been assigned as follows: Pan American, 1 hour; Eastern Air Lines, 30 minutes; National Airlines, 10 minutes; Chicago and Southern Air Lines, 10 minutes; W. R. Grace & Company, 1 hour; and Public Counsel, 1 hour. Counsel for Pan American may reserve a portion of his time for rebuttal.

At the suggestion of counsel, the Board will receive briefs on this question in order to facilitate a presentation of authorities and such detailed facts as may be necessary and in order to restrict the time required for the oral presentation. These briefs will be due January 15, 1944, and should not exceed 50 pages.

Very truly yours,

(sgd) C. EDWARD LEASURE

C. EDWARD LEASURE
Chief Examiner

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Correspondence between the Board and Parties.

Letter of Wright, Gordon, Zachry, Parlin & Cahill to Civil Aeronautics Board, January 4, 1944.

(R. 8846-J, K.)

Letterhead of
WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL
Sixty-three Wall Street
New York

January 4, 1944

Re: Panagra Route Extension Docket No. 779.

Dear Sirs:

We are in receipt of a copy of a letter of Mr. Gambrell, counsel for Eastern Airlines, dated December 27, 1943.

Mr. Gambrell lists five points which he intends to brief and argue in support of Eastern's motion to dismiss this proceeding.

Points 1 and 5 raised by Mr. Gambrell obviously do not raise any question of the Board's jurisdiction, but involve only the issue as to whether the Board, granting that it has jurisdiction, should amend Panagra's certificate so as to provide for the extension of the route. Inasmuch as the Board has denied the cross motion of W. R. Grace & Co. to join the argument on the jurisdiction question with the argument on the merits, we believe it is clear that agument on Points 1 and 5 listed by Mr. Gambrell have no proper place in the argument now scheduled by the Board.

Point 4 raised by Mr. Gambrell relates solely to the application of Section 408 of the Civil Aeronautics Act in this proceeding. While this does raise in part a question of law, it is an entirely different question from the question as to whether the Board has jurisdiction to order the route extension. Inasmuch as we have not been advised by the Board that the issue of the application of Section 408 is to

be considered at this time, we assume that this issue is likewise not properly brought before the Board on this pending argument.

Point 2 involves no question of jurisdiction of the Board, but solely a matter of its discretion, which the Board has, we believe, already conclusively determined.

This leaves only the third point raised in the letter. Even this fails to correctly state the issue now to be argued before the Board. The question is not whether the Board lacks power to grant a new route to Panagra for which it has not applied, but rather whether the Board has the power to amend Panagra's certificate so as to provide for the extension of its route from the Canal Zone to a terminal in Florida.

We believe it to be in the interests of proper and expeditious procedure that the issue before the Board on the argument now set for January 31, 1944 be so defined that irrelevant and extraneous considerations such as those raised in Mr. Gambrell's letter will not be brought into the argument and the briefs. This should be done well in advance of the time set for the filing of briefs.

Respectfully yours,

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co.

Civil Aeronautics Board
Commerce Building
Washington 25, D. C.
[CC to all parties]

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Excerpts from Brief of Pan American Before the Civil Aeronautics Board On Motion to Dismiss, Dated January 14, 1944.

Page 2, Line 16 to Page 4, Line 14, Inclusive (R. 8679-81):

The facts necessary to decision of this motion are as follows:

Under date of August 31, 1928, Pan American Airways Corporation and W. R. Grace & Co. (hereinafter referred to as "Grace") entered into an arrangement (Exhibit P-34, p. 46) "under which we will associate for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chile." A corporation, with a capital stock of $50,000, to be owned equally by each of the two companies, was to be formed for the purpose of engaging in operations in Peru under the concession theretofore acquired by Huff-Daland Dusters, Inc. on which Pan American had an option (Exhibits P-34, pp. 2-19, P-211). If Pan American determined that it was "advisable to bid on a contract for carrying the mails between the Panama Canal and Valparaiso," Grace was to "have a reasonable time after a study of the estimated costs of such operation to determine what interest, if any, we will take in the company making the bid in addition to our initial investment of $25,000, such interest not to exceed, however, more than 50% of the total capitalization."

Pursuant to this understanding Pan American-Grace was organized under the laws of Delaware early in 1929. It became the successful bidder on Foreign Air Mail Contract No. 9 (Exhibit P-34, pp. 66-72). This contract provided for air mail service from the Canal Zone to Santiago, Chile, with a right in the Postmaster General to require extension of the service to Buenos Aires, Argentina and Montevideo, Uruguay. Operations under this contract were begun in May, 1929, and continued until—and after—enactment of the Civil Aeronautics Act.

Excerpts from Pan American's Brief Before Board on Motion to Dismiss.

On the basis of this operation Pan American-Grace was awarded a certificate of public convenience and necessity under the "Grandfather Clause" of the Act for service between the Canal Zone and various points in western Colombia, Ecuador, Peru, Chile, Bolivia and Argentina (Order Serial No. 589, dated July 22, 1940). This certificate has since been amended on the application of Pan American-Grace by orders bearing serial numbers 736, 1075 and 1789, so as to include other operations within the general territory already served.

Pan American-Grace has never operated north of the Canal Zone and its entire history has been that of an air carrier in South America. The airport to airport distance between its northern and southern termini by the shortest route now flown is 3834 miles (C. A. B. opinion, July 30, 1942, Docket No. 716, Appendix S). Total route mileage (including a considerable amount of paralleling mileage) is approximately 8800 miles (Tr. 437, 796).

As stated above, Pan American-Grace has not applied for authorization to operate north of the Canal Zone. Pan American Airways Corporation and Grace, each of which owns 50% of the stock of the Company and is represented by an equal number of directors, entertain opposing views as to the making of any such application, this difference of opinion relating, among other things, to the question of the purpose for which Pan American-Grace was formed. The directors representing Pan American Airways Corporation, on instructions from that corporation, abstained from attending meetings at which it was known that the Grace directors would move that Pan American-Grace apply for an extension of its route from the Canal to the United States, on the ground that the matter was covered by agreements between the two stockholders which could not be altered without their assent (Exs. P-35, pp. 28, 30; PG II-12). At a meeting held on September 22, 1942, which was at-

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tended by all of the directors, a resolution proposing that Pan American Grace apply for such an extension was moved by one of the Grace directors but failed of passage (see minutes of this meeting submitted confidentially by counsel for Pan American-Grace).

Page 14, Line 34 to Page 15, Line 9, Inclusive (R. 8691-92):

An operation between the Canal Zone and the Florida peninsula, a distance of nearly 1,250 miles to Miami and over 1,400 miles to Tampa, a route as long as the entire operation of a number of the domestic carriers, is definitely a "new route", which "the Act does not now give to the Board power to initiate . . . where applications therefor are not first filed by private individuals or companies." The "amendment" provisions of Section 401(h) are wholly inadequate to authorize an order compelling such an operation—particularly so in the light of the fact that when Congress passed the Civil Aeronautics Act, it had before it the Supreme Court's decision in the *Oregon-Washington* case limiting the far more definite language of the Interstate Commerce Act.

One cannot improve on the Board's statement: "The word 'amendment' is vague and carries with it a limited concept." So great a power as that here in question cannot be rested on such a flimsy foundation.

Excerpts from Brief of W. R. Grace & Co. Before Civil Aeronautics Board in Opposition to Motion to Dismiss, Dated January 15, 1944.

Last Three Paragraphs on Page 3 (R. 8588):

I. The Board's power under Section 401 (h) to amend a certificate on its own initiative includes the power to provide for an extension such as is involved here. This conclusion follows both from an analysis of the language of the section and from its legislative history, as well as from the Act as a whole.

II. Pan American is not in a position to raise constitutional objections. In any event, on the facts presented here, an amendment requiring Panagra to operate to a Florida terminal is reasonable and, therefore, would not result in a deprivation of property without due process of law.

The issues here cannot be decided on the basis of pure legal argument *in vacuo*. Questions of fact concerning the proposed extension are involved. In this proceeding, therefore, reference to the record made at the hearings before the Trial Examiners is not only proper, but necessary. Facts relating to the proposed extension are summarized *infra*, pages 34-39.

Page 4, Lines 17 to 27, Inclusive (R. 8589):

It should be stated at the outset that there is no contention here that the Board's power under this provision to compel operation of route extensions is unlimited, or that it may be exercised in arbitrary disregard of constitutional limitations. But where, as in the present case, the proposed extension is clearly an amendment of Panagra's certificate within the common sense signification of that term, and is moreover a reasonable amendment required by the public convenience and necessity, an exercise of the Board's power of compulsion is plainly within the authority granted to it by the Act.

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Excerpts from Grace's Brief Before Board on Motion to Dismiss.

Page 9, Line 17 to Page 10, Line 14, Inclusive (R. 8594-95):

The extension involved here is not of such nature as to work an "utter transformation" of the character of the present route. The total route mileage involved—1150—is considerably less than was involved, for example, in the *Pan American, Singapore* case, *supra*, page 7. This mileage is less than 1/7 of Panagra's present route mileage and consequently less relatively than the amendment allowed in the *Braniff Airways, Kansas City—New Orleans* case, *supra*, page 6.

Most of the additional mileage is over water. Under the proposed permanent operation with four engined equipment, flights will be made non-stop between the Canal Zone and the United States. Thus, the United States terminal would add only one stop to the Panagra route which now includes 35 stops. Even the temporary DC-3 operation would add only one refueling stop in addition to the United States terminal.

The character of the operation on the proposed route is of considerably greater importance than the mileage. Balboa to Florida is a routine flight operation. Panagra's extension across Bolivia, while shorter, was a much more difficult operation, both from the standpoint of establishing airports in the interior, and of establishing a local cabotaje operation to serve a considerable number of way stations.

In the period 1938-1942 over 75% of the passengers carried by Panagra out of the Canal Zone were received from Pan American's connecting lines (Ex. P. G. 1, Item 1). Conversely, over 75% of the passengers brought to the Canal Zone by Panagra were turned over to Pan American's Eastern and Western Divisions to continue their journey (Ex. P. G. 1, Item 3).

Page 27, Lines 23 to 29, Inclusive (R. 8612):

Even if Pan American could oppose the amendment on constitutional grounds, its contentions are without merit.

Excerpts from Grace's Brief Before Board on Motion to Dismiss.

As in other situations where an action of an administrative agency is attacked as depriving a person of property without due process of law, the reasonableness of the amendment proposed in this proceeding is the criterion by which its constitutional validity must be tested.

Page 32, Lines 15 to 19, Inclusive (R. 8617):

To elevate, as does Pan American, the "undertaking to serve" fiction to the dignity of an inflexible rule of constitutional law is wholly at variance with the established principle that reasonableness under all the facts and circumstances is the test of the validity of governmental action.

Pages 34 to 39, Inclusive (R. 8619-24):

D. THE AMENDMENT PROPOSED IN THIS CASE IS REASONABLE

The following facts, taken from the Record in Docket 779 amply demonstrate the reasonableness of an exercise by the Board of its power to "require" Panagra to come through to a Florida terminal.

1. Panagra's Existing Service.

Panagra's growth and expansion over the ten-year period 1933 to 1942 effectively demonstrate not only that it is able to undertake additional service without difficulty, but also that the proposed extension is merely a further development in Panagra's natural growth. The following is a brief summary of this development (795-9; Ex. PG-4, Item 5):

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Excerpts from Grace's Brief Before Board on Motion to Dismiss.

	1933	1942
Route Miles	4551.5	8551.2
Airplane Miles	1,162,394	4,033,194
Passenger Miles	4,508,720	43,528,646
Frequencies	Twice weekly	Daily (plus additional trips)
Commercial Revenue	$426,000	$4,788,000
Investment in Aircraft & Ground Facilities	$955,000	$3,791,000

During this period, the following additional increases are reflected:

Average ton miles	355%
Used ton miles	680%
Passenger revenue	1,046%
Express & freight revenue	3,160%

2. Pan American's Traffic on the Miami-Canal Zone Route.

The proposed service is on a route on which there already is extremely heavy traffic, with unlimited possibilities of further development. This is apparent from the following statistics on the volume of passenger traffic, mail and express on the Miami-Canal Zone route as operated by Pan American during the years 1940-42 (Exs. P-2; P-14):

Southbound

Year	Total Passengers Carried	Pounds of Mail	Pounds of Express
1940	1241	87,966	197,522
1941	2273	135,764	206,308
1942	6053	422,809	785,691

Excerpts from Grace's Brief Before Board on Motion to Dismiss.

Northbound

1940.....	1368	64,907	41,435
1941.....	2315	116,258	43,106
1942.....	7062	335,370	79,611

3. Extent of Proposed Service.

The proposed service is not over a new and uncharted course where unknown navigational, meteorological and other problems might be encountered. It is, as has previously been mentioned, but one stop beyond Panagra's present terminal, involving largely an over-water operation.

The additional mileage represents an increase, on a through operation* between Florida and the Canal Zone, of 1,150 miles (Ex. PG-4, Item 30, p. 12).** This is by no means a formidable addition for a carrier whose route miles have increased from 4,463 in 1929 to over 8,800 in 1943. As previous illustrated, *supra* pp. 9-10, the character of the proposed operation and not solely the mileage involved is important.

The exhibits are based upon a proposed daily service, which is the same frequency as Panagra now operates on its international trunk route.

4. Expenditure Required.

With respect to the expense attendant upon the projected service, the exhibits show (Ex. PG-4, Item 30, pp. 12-13 and Item 34) that the total investment for equipment will amount to $835,000. In connection with this estimated expense, the following facts are significant to note:

(1) The estimates given are of course based upon the high price level prevailing in 1943.

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* This refers to a non-stop operation between Florida and the Canal Zone with DC-4s or other available equipment of that type. DC-4 statistics were used in the exhibits. Ex. PG-4, Item 34, page 3 states, however, that "whatever modern and suitable type of four-motored flying equipment might be available for this operation should be used. It is believed that the corresponding operating figures would be no less favorable than those submitted herein."

** Unless otherwise indicated, all statistics given relate to a terminal at Miami, Florida. Corresponding figures for Tampa will be found in the exhibits.

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(2) Some of the estimated capital expenditures (e.g., for communications equipment) might be reduced by joint facilities arrangements. (452)

(3) The relatively small amount involved is attributable to the fact that there will be fewer stations per route mile on the proposed extension than on the present operations, namely, only one in Florida, and one in Kingston (on the DC-3 operation only), with some possible additional expenditures at Balboa (1461).

5. Financial Condition of Panagra.

Panagra is in a strong position to undertake this estimated expenditure. Comparing the financial record of Panagra with any commercial airline in the United States, it is such, in the opinion of the President of the Company, that "there is not any airline that can match it" (798).

As of the end of 1942 the company had cash and Government bonds of $2,592,000, total gross assets of $10,754,000 and a net worth, exclusive of good will of $3,900,000. During the ten-year period 1933 to 1942 the company capitalized the sum of $2,850,000 and built up a miscellaneous reserve of $399,000 and a self-insurance reserve of $1,201,000 (796-8; cf. Exs. G-22, G-23).

The relatively small amount of the capital expenditure required for the permanent operation between Florida and the Canal ($835,000) is apparent when compared with these figures. Moreover, it is less than half the estimated operating revenue for one year.

6. Estimated Revenue, Expenses and Return Expected.

The secure position of the company from a financial standpoint and the estimate of expected revenue from the proposed operation, demonstrate the absurdity of any argument that an order requiring the extension would be a deprivation of property in violation of the due process clause.

Excerpts from Grace's Brief Before Board on Motion to Dismiss.

The estimates of Panagra's Vice-President and Comptroller envisage an annual revenue of $1,929,500 on the basis of daily service with DC-4s between Miami and Balboa. The estimated annual operating expenses are $1,686,700.

This results in an estimated operating profit, before United States mail but including revenue for the carriage of foreign mail northbound, in the amount of $242,800* (PG-4, Item 34, p. 3). Of course, the rates which Panagra would receive for carrying southbound mail (including any subsidy) will be determined by the Board. In accordance with established practice, however, such rates would be fixed at a point which would cover Federal taxes and a return on the investment, as well as any possible deficit from operations.

These estimates of revenue to be derived by Panagra on the suggested route are supported by conservative estimates of the passenger, mail and express traffic to be carried by Panagra (49-50; Ex. PG-4, Items 16 and 20).

As a result of the remarkable growth of Panagra during the past ten years or so, it is the opinion of the operations executives of Panagra that the Company is in a better position today than ever before to add more mileage, because it is starting from a higher basis and with a larger organization, with the result that the proposed service will cause no increase in the general and burden expenses of operations (453-4; 601-2).

7. Advantages to the Public.

Over 75% of Panagra's passengers carried south from the Canal Zone are received from Pan American at the Canal and approximately the same percentage of those brought to the Canal northbound are transferred to Pan American's respective divisions for carriage to destinations in the United States (Ex. PG-1, Items 1 and 3).

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* On the DC-3 operation from Miami, the estimated operating profit is $37,100. If the operation were from Tampa, instead of Miami, there would be an operating deficit of $10,200 (DC-4 operation) and $181,300 (temporary DC-3 operation).

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Excerpts from Grace's Brief Before Board on Motion to Dismiss.

Numerous advantages will accrue to these passengers from an extension of Panagra's route to a Florida terminal.

The advantage of the speedier service on the DC-4 operation which would carry through passengers to Lima from Miami in seventeen hours is, of course, obvious. Under the proposed schedule, the Panagra plane would leave Miami at 00:00, arrive in Balboa at 7:15 and be in Lima at 17:05 (PG-4, Items 17-18).

The manifold advantages from the point of view of passenger comfort and convenience on a through service have been abundantly developed in the record. They include:

(a) Fundamentally, and without stating at length the serious inadequacies of Pan American's connecting service, it would relieve the traveling public of all the disadvantages that inhere in any connecting service and would facilitate and improve the services between the United States and the eight important South American countries on Panagra's route (e.g., a number of delays in arrival are inevitable, being caused by weather, motor trouble, and other factors). Such delays are an inherent defect of a connecting service. (223) Apart from the difficulties caused by Pan American's numerous delays (Exs. P-25, P-25A, P-25B), even Panagra delays are proof of the advantages of a Panagra direct through service. (792)

(b) It would eliminate passenger discomfort and inconvenience on a night flying operation. A connecting service would require passengers to arise some time before the arrival at Balboa, and transfer from one aircraft to another, instead of continuing the trip as on a through operation, either asleep or awake, as the passengers might choose. (175-6)

(c) Panagra rather than Pan American would control reservations on the Canal Zone-Florida sector, thus preventing international through passengers from being blocked out by local sector traffic. (804)

(d) The competition provided by the extension would result in improved service generally, as illustrated by the expedition of Pan American's passenger handling at Brownsville since the advent of the competition of American Airlines on the Mexico service. (400)

In addition to these advantages to the traveling public, there would be the following advantages to Panagra itself:

(a) A through service would make possible a *maintenance base* in the United States, nearer and more accessible to the source of supply of skilled labor and of materials and parts—providing an item of economy through the elimination of heavy inventory, rush shipments, etc. Further savings could be obtained on customs duties. It would enable the technical staff to be in closer contact with other experts in the U. S. on special problems that arise in the course of operations. (177-8)

(b) It would assist in the procurement of skilled pilots who would be attracted by the possibility of an occasional layover in the United States. (177-8)

(c) It would make for a more economical *utilization of equipment.* (356-7)

(d) It would result in a *generation of traffic* because of the elements of increased capacity and frequency and of competition. (440-1) The fact that transportation via Panagra could be sold on a through basis would also be helpful in the generation of traffic. (399-400)

(e) It would facilitate *freight service.* The fewer transfers of freight, the more efficient and less expensive the service becomes. Every time cargo has to be handled the package problem becomes serious and the expeditious character of the service is retarded. (806)

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Excerpts from Oral Argument Before the Civil Aeronautics Board on Motion to Dismiss.

Argument of Mr. Friendly

(Pan American)

S. M.* 16, Line 8, to S. M. 17, Line 8, Inclusive (R. 8423-24):

When I read the Board's annual report for 1942, it seemed to me that the Board fully appreciated these considerations and construed the statute as I have suggested this morning it should be construed, and as I believe it generally has been construed by the industry.

Rereading that report, as I have done many times since this issue arose, I still cannot interpret it in any other way. Counsel for Grace & Co. say that what the Board was really trying to tell Congress was that it had no power to compel the inauguration of a new route, although it did have power to require extension of an existing route, and says that, in even intimating the contrary, Pan American is guilty of a systematic attempt to confuse the issue.

Not wanting to be guilty of that, I read the report again and I think it takes a pretty close reading to find in it the distinction that is relied on. I am not sure that the distinction helps the argument, anyway. What is there to tell us that an operation of 1,200 miles between the continental United States and one of its overseas possessions is merely an extension, or, as was said during the hearings, a shuttle service, as distinguished from a new route. Eastern Airlines operation from New York to Miami, the United's from Seattle to San Diego have always been considered pretty important routes. They have been the envy of many in the business. The Canal Zone-Miami route is longer than any of those. In fact, it is longer than the entire operation of some of the other carriers and if that is not a new route, one may fairly ask what is.

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* S. M. refers to the stenographic minutes of the oral argument or of the hearings before the Examiners, as the case may be.

Excerpts from Oral Argument on Motion to Dismiss.

S. M. 164, Line 29, to S. M. 166, Line 14, Inclusive (R. 8571-73):

There has been talk about 8,800 miles of route of Pan American-Grace in South America which is true enough if you understand that it includes all the paralleling mileage, for example, the sawtooth across Bolivia is counted twice, and that actually the distance between the termini is 3,844 miles.

The company has grown but it is not unique in that.

Then, various reasons are marshalled why it is not a new route. A certain deep significance appears to be given to the fact that it is over water. Well, I wonder whether Los Angeles-Honolulu is not a new route for TWA. There not only is there no stop but there is no place where you could stop, and yet it seems to me that that is a new route on any ordinary meaning of the words. It is about twice as long as this, but I can't imagine that is the test. If 1,200 miles is not a new route, then, why not 2,400 miles? Then, the purpose is said to be more adequately to serve the existing traffic, and it is said that over 75 percent of Panagra's passengers carried south from the Canal were received from Pan American. That again is approximately a true statement if you listen to it closely, but in listening to it, you have to bear down on that word "from." "Carried south from the Canal," not "carried south of the Canal," because you see, actually the through passengers carried from the Canal have always been a comparatively small part of Pan American-Grace's passengers. Then, something is said about the New Orleans case. I have already pointed out that that was not a 401(h) application, and as to what I said as to that not being an ordinary new route, I think there is the obvious distinction that Pan American had been engaged in serving the trade between the United States and the Canal Zone for 14 years out of these other gateways

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to the east and west, whereas that is a trade which Pan American-Grace has never served.

ARGUMENT OF MR. CAHILL

(Grace)

S. M. 62, Line 20, to S. M. 66, Line 29, Inclusive (R. 8469-73):

Mr. Cahill: May it please the Board, in opening the argument on behalf of W. R. Grace & Co., I should like to refer to certain of the basic facts in regard to Panagra.

Panagra presently holds a certificate of public convenience and necessity for the carriage of persons, property, and mail between Balboa in the Canal Zone and Buenos Aires, via the West Coast of South America. Its present route mileage is approximately 8,800 miles.

The instant proceeding involves an extension of approximately 1,150 route miles. That is less than 1/7 of the existing route mileage.

Now, turning for just a moment to the growth of Panagra, the following few figures indicate the extent of Panagra's growth during the 10-year period from 1933 through 1942.

Panagra's route mileage has practically doubled. Its airplane mileage has quadrupled. Its passenger mileage has increased 10-fold. Its frequency has increased from twice a week to 7 times a week, plus additional trips. Its commercial revenue has increassed more than 10 times and its investment in aircraft and ground facilities has increased four times.

In addition Panagra's passenger revenue has increased more than 10 times. Its express and freight revenues have increased almost 30 times.

Since the year 1942 Panagra's growth and development has continued at even a greater pace. Just taking a few of the statistics of Panagra, comparing 1943 with 1942,

its plane miles in 1943 were 4,700,000, an increase of practically 700,000 over 1942; its passenger miles in 1943, 57½ million miles, an increase of 13½ million over the year before. Passengers carried in '43, 69,000, an increase of 13,000 within the year.

Pounds of express in 1943, 2,000,000, an increase of 607,000 pounds within the year. In mail, 280,000 pounds in '43, an increase of practically 40,000 pounds, and in personnel 2,500 employees in 1943; 1,600 employees in 1942.

From those few statistics, cold though they are, the Board will see that Panagra's development over the past decade has continued apace, and that this proposed extension would not be a sudden and staggering expansion to a carrier which has maintained a static position over a period of years. It would be on the contrary but the natural growth of Panagra, which has grown, as I have said, apace over the years.

Now, taking again just a few figures on the financial aspects of this proposed extension: the total investment for equipment, assuming DC4 operation, is only $835,000. Most of this will be for flight equipment, which Panagra would be able to use anywhere.

Now, that figure of $835,000 is insignificant when we consider these few figures: Panagra, as of 1942, had cash and Government bonds of over two and a half million dollars, total gross assets of $10,750,000, net worth, exclusive of good will, of practically four million dollars. This capital expenditure of $835,000 is less than half the estimated operating revenue of the extension for one year, without United States mail pay, and it is less than four times the estimated annual return on DC4 operation. Hence the total capital investment about which we are talking will be made up in less than four years.

The estimated annual expenses on this DC4 operation would be approximately a million six hundred thousand dollars. There would, therefore, be an estimated annual

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return of approximately a quarter of a million dollars before United States mail pay.

Now, I should like to take up, from the factual aspect, those features of the proposed extension which I think show clearly its character as not being a new route. Under the proposed permanent operation of this extension, with four engined equipment, the flights will be made nonstop between the Canal Zone and the United States, thus the bringing of this American Flag carrier to its home country will add only one stop to a carrier that now has 35 stops on its route, and even with temporary DC3 operation, this extension would add only one additional refueling stop.

Now, the mileage here is not a significant factor. When counsel attempts to compare it with the route of Eastern or the route of United on the West Coast, counsel leaves out of account the fact that this route is almost entirely over water. The flight is much simpler from technical and operation points of view than many other Panagra operations, and the purpose of this proposed extension is to more adequately serve the existing traffic on the present Panagra line. It is undisputed here that in the period 1938 through 1942 over 75 percent of Panagra's passengers carried south from the Canal Zone were received from Pan American at the Canal, and in the same period approximately the same percentage brought to the Canal northbound were transferred to Pan American's various divisions for carriage to the United States.

Now, there is an interesting parallel in a previous proceeding before this Board, and I refer to the New Orleans route case. There Pan American sought an amendment. It wanted to extend its route from Guatemala City to New Orleans and to provide a route between New Orleans and Balboa via Havana.

Now, at that time and under those circumstances, this is how Pan American described its application, and I quote a sentence: "The application of Pan American proposes not the inauguration of a new route in the usual sense but

rather an extension and improvement of the existing service of that carrier," and continuing, the brief says, and I quote: "It will be seen that about half of the route distance involved in the proposed New Orleans-Central America-Canal Zone operation is already a part of the operations of Pan American, and that every terminal and intermediate point on the route involved in this proceeding, except only the City of New Orleans itself, is now served by that carrier.

"The purpose of the present application is, therefore, not to inaugurate a new route in the usual sense, but by opening the New Orleans Gateway to improve Pan American's existing service to Central America and the Canal Zone," and counsel in his oral argument in that case, on behalf of Pan American, referred to the service proposed, and I quote: "as a rather modest change in the air transport map."

For Panagra here, carrying through the analogy, the granting of a Florida terminal will amount to no more than an extension and an improvement of its existing service, and to paraphrase the Pan American position, that this proposed service will not involve the granting of a new route but the opening of a terminal or gateway.

S. M. 101, Line 19, to S. M. 102, Line 15, Inclusive (R. 8508-09):

Mr. Ryan [Board Member]: Assuming that it exists and you give literal interpretation to the words "modify" and "amend" where would you stop? Does that power give the Board the right to require Panagra, for instance, to extend frequencies from Balboa to Moscow?

Mr. Cahill: I don't think you can take a hypothetical situation in vacuo and determine the application of 401(h) to them, because I think that 401(h) in applying what has now come to be known practically as the universal standard for the guidance of regulatory commissions, namely, the familiar touchstone of public convenience and necessity causes you to look elsewhere in the statute for the meaning

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of public interest, requires you to look elsewhere still for what you find. I cite, for example, the exhortation at the beginning of the Act, "to encourage American Aviation." I cite the application of the standards in the section of your Act that has to do with rate making elements, you see, against the record made in a particular application. The composite of those you apply in determining your statutory standard.

Now, your statutory standard of public interest, convenience and necessity will oftimes coincide with the interests protected by the fifth amendment of the Constitution of the United States, namely, the standard of reasonableness.

That is how I approach the problem.

ARGUMENT OF MR. HARLAN

(Eastern)

S. M. 150, Line 11, to S. M. 151, Line 15, Inclusive (R. 8557-58):

Now, another point which has been made is that the ordinary dictionary definition of the word "amend" is adequate to cover the proposed new service here under consideration. Now, I submit—Mr. Cahill, I believe, said that no one disputed that. I submit that there is a dispute on that and if Mr. Cahill will read our brief on pages 17 and 20, he will discover that there is a dispute. We have taken the same definition which the others have used here to the effect that an amendment is a change which does not change the identity or the character of the thing which has been changed. Now, I submit that the ordinary man in the street would not agree offhand that a 1200 mile new route between the Canal Zone and the United States is a mere amendment of Panagra's existing route. I think that Grace itself has taken the position that that is substantially more than an amendment.

Excerpts from Oral Argument on Motion to Dismiss,

On page 18 of our brief, we have quoted from Grace's petition which was the occasion for the inauguration of this proceeding, in which Grace said that the new route between the Canal Zone and the United States "would give the Panagra route the standing of an independent American International airline with a terminal in the United States," and I submit that is a statement on the part of Grace to the effect that the character of Panagra would be changed by reason of this proposed extension and I don't believe that Grace can take the position that this is a mere extension and improvement of its existing service, and then turn around on the other hand and argue that this change is necessary in order to give Panagra an independent status which it does not now have; because I believe that does change decidedly the character and identity of Panagra, at least under the allegations made by Grace.

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Memorandum of Pan American in Opposition to Petition of Grace for Reargument and Reconsideration.

(R. 8819-31).

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under Section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

MEMORANDUM ON BEHALF OF PAN AMERICAN AIRWAYS CORPORATION IN OPPOSITION TO PETITION OF W. R. GRACE & CO. FOR REARGUMENT AND RECONSIDERATION.

ROOT, CLARK, BUCKNER & BALLANTINE,
Attorneys for Pan American Airways Corporation.

HENRY J. FRIENDLY,
Of Counsel.

Memorandum of Pan American in Opposition to Petition of Grace for Reargument and Reconsideration.

BEFORE THE

CIVIL AERONAUTICS BOARD

IN THE MATTER *of* The alteration, amendment and modification of the certificate of public convenience and necessity of PAN AMERICAN-GRACE AIRWAYS, INC. under Section 401(h) of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.	Docket No. 779.

MEMORANDUM ON BEHALF OF PAN AMERICAN AIRWAYS CORPORATION IN OPPOSITION TO PETITION OF W. R. GRACE & CO. FOR REARGUMENT AND RECONSIDERATION.

We have received a copy of the petition of W. R. Grace & Co. (hereinafter referred to as "Grace") dated June 22, 1944, for reargument and reconsideration of the Board's order of May 24, 1944, dismissing this proceeding. While we believe it has not been the general practice to reply to petitions for reargument or reconsideration, Grace's petition contains so many misleading statements that we deem it our duty to call these to the attention of the Board. The material contained in Points I and III of the petition would not constitute grounds for reargument or reconsideration in any event, and we shall therefore confine this memorandum to Point II of the petition, in which Grace advances the claim that the Board deprive Grace of a fair hearing on the issue involved in the Board's order.

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The Board's conclusion, to which Grace objects, was (Opinion, p. 11) "that the extension of Panagra's route from the Canal Zone to the United States would not be an alteration, amendment, or modification of its certificate within the meaning of Section 401(h) of the Act in the sense that the Board could compel such an extension in the absence of an application from Panagra."

The facts and the reasoning leading to this conclusion are set forth in the last two paragraphs on page 10 of the Board's opinion. No exception is, or could be, taken by Grace to the statement of facts in the first of these paragraphs, which, indeed, follows very largely Grace's own presentation.

In proceeding from this statement to its conclusion, while the Board mentions the conceded facts as to the mileage of the new service and the minimum additional investment required, the Board states (Opinion, pp. 10-11):

> "However, the principal consideration which influences us is the fact that to extend the Panagra system from the Canal Zone to a point in Florida would constitute a basic transformation of the character of the carrier. Panagra, now a connecting carrier as to through traffic between the United States and South America, would be made a carrier directly serving that traffic—and serving it moreover in competition with an affiliated company. There is a fundamental difference between the position of a carrier whose routes stop so far short of the continental United States as those of Panagra and which depends upon connecting carriers for access to traffic to and from that area, and a carrier which has direct access to the continental United States over its own system."

Grace does not, and cannot, claim any error of fact in this statement of the "principal consideration" leading

to the Board's conclusion. Instead, Grace seeks, by piling up misleading characterizations and partial quotations, to create the impression that Grace was somehow prevented from placing before the Board possible *countervailing* considerations, of a nature not clearly revealed. Analysis of this series of characterizations and quotations demonstrates the baselessness of this claim.

PAN AMERICAN'S ORIGINAL MOTION TO DISMISS (GRACE PETITION, PP. 8-9):

Pan American's original motion to dismiss dated September 14, 1943, did not raise a mere academic question of statutory construction, as Grace now seeks to maintain. It raised a question of the construction of Section 401 of the Civil Aeronautics Act *as applied to this particular case.* The motion was (pp. 1-2) "that the Board dismiss this proceeding on the ground that, for the reasons hereinafter set forth, the Board does not have the legal power to order Pan American-Grace Airways, Inc. to operate to a terminal in the United States, as proposed in the Board's order initiating this proceeding, and that the Board is without jurisdiction herein." The motion set forth the facts (p. 2) that Pan American-Grace Airways, Inc. was formed for the purpose of operating south of the Panama Canal, that Pan American-Grace had operated for many years south of the Canal and held a certificate for such operation, and (p. 3) that the proposal here in question was for an order "requiring a carrier to extend its operations over a new route 1,200 miles long, through an area which the carrier has never previously served." Referring to the Board's statement in its Third Annual Report that "the Act does not now give to the Board power to initiate the establishment of new routes for air transportation services where applications therefor are not first filed by individuals or companies," the motion alleged (p. 5) that "The impact of this pronouncement cannot be avoided by calling an operation of 1200 miles through the

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Caribbean between the Canal and the United States a mere 'extension' of an existing route in South America,"—almost the exact ground, as we see it, that was ultimately taken in the Board's opinion.

The relation of the particular "extension" here in controversy to Pan American-Grace's existing operations was thus invoked at the outset. However, even if the original motion to dismiss had been, not what it was, but what Grace alleges it to have been, this would still be utterly irrelevant, since this motion was denied by the Board's order of September 23, 1943.

When Pan American renewed its motion to dismiss at the close of the hearings, the motion again necessarily related to the action proposed to be taken *on the facts of this case,*—not in some other where the facts were different. To be sure, the motion related to the *power* of the Board and not to whether or not the power should be exercised. It seemed to Pan American, and it still seems, that, on any view, the range of facts necessary to be considered in determining the issue of the Board's *power* was much more limited than would be involved in an attempt to determine the *merits.* However, the record had been made, and if Grace's counsel conceived it to contain facts showing that the Board had power under the Act to order an "extension" of the size and character of that here involved, the record was there for such use as they desired to make of it. As will shortly appear, counsel in fact *did* make extensive use of this record to advance the very contentions which they now claim Grace was in some manner prevented from making.

ACTION OF BOARD ON GRACE'S CROSS-MOTION (GRACE PETITION, PP. 9-10):

In opposing Grace's cross-motion dated December 2, 1943 to defer consideration of the jurisdictional question and join the same with the merits, Pan American's position was not, as Grace seeks to maintain, that the question of

the Board's power to make the proposed order could be determined in a vacuum, without any regard to the facts, but rather that advance determination of the jurisdictional issue would avoid the necessity for elaborate briefing of many questions, some of which were irrelevant to such a determination on any view and others of which would require no such detailed discussion on the jurisdictional issue as they would upon the merits. The nature of Pan American's position becomes clear if the Board will read Pan American's letter of December 3, 1943 as a whole, rather than the single paragraph with one sentence omitted, which is quoted on page 10 of Grace's petition. In any event, whatever position was or was not taken by Pan American, the Board's refusal to postpone consideration of the jurisdictional issue to the merits did not mean at all and, as we shall show, was not understood by Grace's counsel to mean, that the record was not before the Board.

ACTION OF BOARD ON POINTS RAISED BY EASTERN AIR LINES (GRACE PETITION, PP. 10-11):

Grace's petition seeks to create the impression that Eastern sought to argue certain questions of fact relating to the Board's power to order the extension; that Pan American objected to Eastern's doing this; and, apparently, that as a result of this objection and the Board's ruling thereon, Grace was misled into failing to argue these facts. The record belies this claim.

In his letter dated December 27, 1943, counsel for Eastern Air Line gave notice of his intention to argue *five separate bases* for dismissal. Four of these would have been equally pertinent if Pan American-Grace had itself been applying for the Canal Zone-Miami route. Only one of them, the third, dealt with the power of the Board "to grant a new route to Panagra for which Panagra has not applied."

After a summary of this letter of Eastern's counsel which fails to convey any accurate impression of what Eastern's counsel was actually proposing, Grace quotes the

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third paragraph of our letter of January 3, 1944 objecting to "any such broadening of the argument to be heard at this time as is indicated in the letter of counsel for Eastern," and says "This again shows that the motion was intended to be confined solely to the general legal point." Grace carefully omits reference to the two paragraphs of our letter *preceding* that quoted, which demonstrate that Pan American's "objection" was not to the presentation of any arguments, factual or legal, relevant to the power of the Board to order the proposed Canal Zone-Miami operation without an application having been filed, but rather was to consideration of the four other grounds set forth in the letter of counsel for Eastern Air Lines which had nothing whatever to do with that issue.

Whatever may be thought of this wholly misleading summary of Eastern's letter and quotation from our answer, we must confess our amazement that, in discussing this episode, Grace should not have disclosed *that Grace's counsel also opposed consideration of the grounds urged by counsel for Eastern Air Lines on the same grounds which we had taken.* A *complete* copy of this letter of Grace's counsel dated January 4, 1944, is attached hereto as Appendix A.

BRIEFS OF THE PARTIES (GRACE PETITION, PP. 11-12):

In considering Grace's present claim that it was deprived of an opportunity to argue the facts, the Board should carefully examine pages 34-39 of Grace's brief. Grace there advanced, with citations to the record, every argument which, so far as we know, ever has been advanced in favor of the proposed Canal Zone-Miami operation. "The advantages to Panagra itself and to the public interest," the "prospective net earnings from the extension," "the character and adequacy of the existing service between Miami and the Canal Zone," "the length of the extension, not so much as an arbitrary number of miles, but in relation to the intervening terrain and

in relation to the essential nature of air transport," "the nature and scope of Panagra's existing service and the character of its traffic, and the manner in which it has heretofore served traffic to and from the United States,"—these very points, which Grace's petition (pages 5-6) recites as those which the Board should have considered, were argued at length in these pages of Grace's brief. When the Board made its decision, it had this statement of the case for the proposed extension. What it did not have and, in view of its decision did not need, were the statements of Pan American, Eastern, and the other parties, of the case against it.

While Grace's petition does make a vague and grudging reference to this portion of its brief (p. 12), it seeks to dispose of this by claiming that it was included "to meet the argument of unconstitutionality, which Pan American had indicated (Motion, p. 4) it would make, and to distinguish the *Oregon* case." Actually this apology is itself a sufficient demonstration of the want of merit in Grace's petition. Grace's position was (1) that Section 401(h) of the Act authorized the Board to order any extension which was "reasonable," (2) that such a construction of the Act created no constitutional doubts, and (3) *that, as stated in the point heading at the top of page 34 of its brief, and as developed in the following pages, "The amendment proposed in this case is reasonable."* What happened was that the Board disagreed with the third of Grace's contentions. We can understand Grace's disappointment at this. But the Board's failure to accept the contentions which a party has made on the facts does not warrant a claim of deprivation of fair hearing. Neither does such action justify reconsideration or reargument, apart from such a claim, when there is no specific indication that any other or different facts could now be adduced.*

* The contention seems to be, not that any *different* facts could have been presented but that a longer brief could have been written (See Grace petition, fn., p. 12).

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ORAL ARGUMENT (GRACE PETITION, PP. 12-13):

The course followed by Grace in selecting extracts from the oral argument is consistent with that already portrayed. For example, the petition quotes the opening sentence of the argument of counsel for Pan American where counsel stated that he was "to argue what I believe is called a pure question of law" (S. M. p. 5), without quoting the very next sentence in which counsel defined that "pure question of law" as being "whether the Board has power, as said in your Show Cause Order, to authorize and require an air carrier to engage in a new operation 1,200 miles long in an area never previously served by it, and which the carrier has not requested authorization to serve." Still more misleading is the failure of the petition to call attention to the extended argument on the facts made by counsel for W. R. Grace & Co. (S. M. pp. 62-68).

The simple facts are (1) that Grace brought to the Board's attention every consideration which has been or could be urged to show the "reasonableness" of the proposed Canal Zone-Miami operation; (2) that Pan American took the position that, even assuming these considerations *arguendo*, and therefore without the necessity either of subjecting them to detailed scrutiny or of adducing any contrary considerations other than the conceded facts concerning the nature of Pan American-Grace's operations, the Board did not have power to take the action proposed; and (3) that while the Board's decision was predicated on a construction of the Act less restrictive than that urged by Pan American, Grace had every opportunity to present, and did in fact present, any facts that could be claimed to bring the case within the construction of the Act adopted by the Board.

Memorandum of Pan American in Opposition to Petition of Grace for Reargument and Reconsideration.

Grace's petition advances no ground that would in any way justify the Board in requiring further time and energy to be expended upon this case.

Respectfully submitted,

ROOT, CLARK, BUCKNER & BALLANTINE,
Attorneys for Pan American Airways Corporation.

HENRY J. FRIENDLY,
Of Counsel.

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have this day served the foregoing memorandum upon all parties who appear of record in this proceeding by causing to be mailed a copy thereof, properly addressed, to the attorneys for each of such parties.

Dated: New York, N. Y., June 29, 1944.

JOHN P. APICELLA.

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APPENDIX A.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL
SIXTY-THREE WALL STREET
NEW YORK

January 4, 1944

Re: Panagra Route Extension Docket No. 779.

Dear Sirs:

We are in receipt of a copy of a letter of Mr. Gambrell, counsel for Eastern Airlines, dated December 27, 1943.

Mr. Gambrell lists five points which he intends to brief and argue in support of Eastern's motion to dismiss this proceeding.

Points 1 and 5 raised by Mr. Gambrell obviously do not raise any question of the Board's jurisdiction, but involve only the issue as to whether the Board, granting that it has jurisdiction, should amend Panagra's certificate so as to provide for the extension of the route. Inasmuch as the Board has denied the cross motion of W. R. Grace & Co. to join the argument on the jurisdiction question with the argument on the merits, we believe it is clear that argument on Points 1 and 5 listed by Mr. Gambrell have no proper place in the argument now scheduled by the Board.

Point 4 raised by Mr. Gambrell relates solely to the application of Section 408 of the Civil Aeronautics Act in this proceeding. While this does raise in part a question of law, it is an entirely different question from the question as to whether the Board has jurisdiction to order the route extension. Inasmuch as we have not been advised by the Board that the issue of the application of Section 408 is to be considered at this time, we assume that this issue is likewise not properly brought before the Board on this pending argument.

Point 2 involves no question of jurisdiction of the Board, but solely a matter of its discretion, which the Board has, we believe, already conclusively determined.

This leaves only the third point raised in the letter. Even this fails to correctly state the issue now to be argued before the Board. The question is not whether the Board lacks power to grant a new route to Panagra for which it has not applied, but rather whether the Board has the power to amend Panagra's certificate so as to provide for the extension of its route from the Canal Zone to a terminal in Florida.

We believe it to be in the interests of proper and expeditious procedure that the issue before the Board on the argument now set for January 31, 1944 be so defined that irrelevant and extraneous considerations such as those raised in Mr. Gambrell's letter will not be brought into the argument and the briefs. This should be done well in advance of the time set for the filing of briefs.

Respectfully yours,

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Attorneys for W. R. Grace & Co.

CIVIL AERONAUTICS BOARD
COMMERCE BUILDING,
Washington 25, D. C.
[CC to all parties]

Excerpt from Transcript of Hearings Before Examiners.

CROSS EXAMINATION OF HAROLD J. ROIG.

S. M. 1096, Line 7 to Line 16, Inclusive (R. 1449):

Q. Now, Mr. Roig, when your controversy over the United States extension was developing, Pan American addressed a letter—more than one letter perhaps—letters which are in the record—stating that they would submit the matter to arbitration.

As I understand it, you and the rest of the Grace directors have refused that offer of arbitration; is that correct?

A. Well, refused is perhaps a word of art. We have never accepted it.

Excerpts from Pan American Exhibit No. P-34

Page 1 (R. 7007).

COPY

December 1st, 1927.

Mr. Richard F. Hoyt,
25 Broad Street,
New York City.

My dear Mr. Hoyt:—

On behalf of Atlantic, Gulf & Caribbean Airways, Inc.,[*] I wish to confirm my understanding of the informal agreement between yourself, representing Keystone Aircraft Corporation, holding notes and/or other similar obligations of Huff Daland Dusters, Inc., and the writer, representing Atlantic, Gulf & Caribbean Airways, Inc., as follows:

1. No effort will be made, at this time, to combine, or affiliate, by formal contract, or otherwise, Huff Daland Dusters, Inc., and the Holding Company, Atlantic, Gulf & Caribbean Airways, Inc.

2. Huff Daland Dusters, Inc., will attempt to negotiate and acquire, with privilege to transfer advantageous concessions for commercial air operations, including actual contracts for the transportation of mail by air from the Governments of Chile, Peru and Ecuador and, possibly, Colombia.

3. Atlantic, Gulf & Caribbean Airways, Inc., shall assist Huff Daland Dusters, Inc., in securing such concessions, through such contracts as they now have or may acquire, with the United States Government.

4. Atlantic Gulf & Caribbean Airways, Inc., shall assist Huff Daland Dusters, Inc., in framing said contracts and

[*] A predecessor company of Pan American.

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concessions, with the end in view of having said contracts return at least sufficient revenue to cover scheduled operating costs, and over a period of years, the maximum net revenue to the Company.

5. When any or all concessions as outlined above shall have been secured, then the stockholders and/or Directors of Atlantic, Gulf & Caribbean Airways, Inc., and Huff Daland Dusters, Inc., shall merge the two interests, through an equitable exchange of stock, the consideration in each case being the actual market value of the aircraft and other fixed equipment of each Company, at the time the merger or consolidation shall have been effected.

If this arrangement is in accordance with your understanding, will you please initial and return this letter, retaining the enclosed carbon for your files.

Yours very truly,

J. T. TRIPPE.

JTT/s

Excerpts from Pan American Exhibit No. P-34.

Page 42 (R. 7058) (R. 7058-62).

June 20th, 1928

Mr. J. T. Trippe,
Atlantic, Gulf & Caribbean Airways, Inc.,
New York City.

Dear Mr. Trippe:

In accordance with Mr. Hoyt's desires, I confirm the following understanding between Huff Daland Dusters and Atlantic, Gulf & Caribbean Airways, Inc.

1. That Huff Daland Dusters will grant to Atlantic, Gulf & Caribbean in return for the sum of $4,000 paid to Huff Daland an option upon the concession for air mails with the Peruvian Government for a period to run until June 1st, 1929.

2. In addition to the $4,000 to be presently paid to Huff Daland Dusters, it is understood that if the option shall be exercised by Atlantic, Gulf & Caribbean that they will pay to Huff Daland Dusters the actual cost of securing this concession, and in addition if at that time the situation warrants it a proper profit to be determined by Messrs. Hoyt, Trippe and Gott, and that this profit shall be added to the above mentioned amounts.

Very truly yours,

Huff Daland Dusters, Inc.

By Edgar N. Gott
Pres.

Excerpts from Pan American Exhibit No. P-34.

Page 31 (R. 7037).

[Award of Foreign Air Mail Contract No. 5 to Pan American]

July 13, 1928.

The proposal of the Pan American Airways, Inc., of New York, N. Y. under the advertisement of May 31, 1928, for carrying the mails in safe and suitable aircraft from Landing Point (n.o.) in Key West, Florida (or such other point in the United States as may be designated by the Post Office Department) by Havana, Cuba, Merida, Mexico, Belize, British Honduras, Tegucigalpa, Republic of Honduras, Managua, Nicaragua, San Jose, Costa Rica, (or such other points in these countries as may be acceptable to their Governments) to Cristobal, Canal Zone, and from Cristobal, Canal Zone, to Key West, Florida, (or such other points as may be designated) seven (7) times a week, for the transportation of mails not to exceed eight hundred (800) pounds a single trip, on a schedule satisfactory to the Postmaster General, for a period of ten (10) years at the rate of two dollars ($2.00) per mile, is accepted, contract to be executed accordingly. Effective date of contract and mileage to be stated in a subsequent Order.

W. Irving Glover,
Second Assistant
Postmaster General.

Excerpts from Pan American Exhibit No. P-34.

Pages 32-39, Inclusive (R. 7038-55).

CONTRACT FOR FOREIGN AIR MAIL SERVICE.

Route No. F. A. M. 5.

This contract, made this 13th day of July, 1928, by and between the United States of America (by the Postmaster General) and the Pan American Airways, Inc., a corporation organized and existing under the laws of the State of New York:

WITNESSETH, That whereas the said Pan American Airways, Inc., has been accepted as contractor on Route No. F. A. M. 5 in conformity with the advertisement inviting proposals for the service specified herein, issued by the Postmaster General under date of May 31, 1928.

NOW THEREFORE, The said contractor undertakes, covenants and agrees with the United States of America:

1. To carry all United States mails (including foreign closed mails in transit through the United States) offered, not to exceed eight hundred (800) pounds a single trip, in safe and suitable aircraft, seven (7) times a week, on a schedule satisfactory to the Postmaster General from Landing Point (n.o.) at Key West, Florida (or such other point in the United States as may be designated by the Post Office Department) by Havana, Cuba, Merida, Mexico, Belize, British Honduras, Tegucigalpa, Republic of Honduras, Managua, Nicaraugua, San Jose, Costa Rica (or such other points in these countries as may be acceptable to their Governments and designated by the Post Office Department) to Cristobal, Canal Zone, and from Cristobal, Canal Zone to Key West, Florida (or such other point as may be designated) and to perform the services and undertakings in connection therewith specified in this contract for and during the term of ten (10) years commencing with the date of inauguration of service which shall not be more than six-months from the date of the acceptance of the proposal (July 13, 1928).

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Excerpts from Pan American Exhibit No. P-34.

2. To take the mail and every part of it from all United States Post Offices and deliver it and every part of it into all post offices on the route covered by this contract, unless other provision is made. The contractor also undertakes, covenants, and agrees with the United States and binds itself to be answerable in damages to the United States for the proper care and transportation of the mails, and to be accountable for any loss or damage resulting to any such mail or to any part thereof by reason of the failure to exercise due care on the part of any of the contractor's officers, agents or employees in the custody, handling or transportation thereof.

For the service herein specified, when performed in accordance with the provision of this contract and evidence thereof shall have been filed with the Postmaster General, the United States agrees to pay to the said Pan American Airways, Inc., compensation at the rate of two dollars ($2.00) per statute mile flown based on the shortest practicable airway distance between points on the route as determined by the Postmaster General, compensation for the return trip from the Canal Zone to be based on the direct distance, by the most practicable route, from Cristobal to Key West or such other point in the United States as may be designated. Payments to be made monthly as soon after the close of each month as accounts can be adjusted and settled; said pay to be subject, however, to be reduced or discontinued by the Postmaster General as hereinafter stipulated, or to be suspended in case of delinquency.

It is further stipulated and agreed by the contractor:

1. That in case of failure from any cause to perform any service required by this contract a pro-rata deduction shall be made from the compensation of the contractor on account of such omitted service, except that pro-rata pay will be allowed for the airway distance flown between stated points on the route traversed on a partially completed trip

if no delay in the mails over the ordinary means of transportation has resulted.

2. That deductions from the pay may be made for allowing the mails to become wet, damaged or destroyed; or when a grade of service is rendered inferior to that stipulated in the contract; and for the loss of or depredation upon the mails in the custody of the contractor or his agents, when such loss is due to the negligence or fault of the contractor or his agents.

It is further stipulated and agreed that the Postmaster General may annul this contract or impose fines or penalties, in his discretion, for repeated failures; for subletting the service without his permission or assigning or transferring the contract; for combining to prevent others from bidding for the performance of postal service; for failure to provide and operate safe and suitable aircraft in accordance with the requirements of the advertisement and this contract; for violating the postal laws and regulations applicable to service under this contract or for failure to perform service according to this contract. Such annulment shall not impair the right of the United States to claim damages from the contractor.

That no member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract or agreement or to any benefit to arise therefrom.

The contractor expressly warrants that it has employed no third person to solicit or obtain this contract in its behalf; or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by it hereunder; and that it has not, in estimating the contract price demanded by it, included any sum by reason of any such brokerage,

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commission, or percentage; and that all money payable to it hereunder is free from obligation to any person or persons for services rendered, or supposed to have been rendered, in the procurement of this contract. It further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the United States, and that the United States may retain to its own use from any sums due or to become due thereunder, an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid.

It is further stipulated and agreed that this contract may be terminated by Congress, or by the Postmaster General whenever, in his judgment, the interest of the postal service shall so require, in which latter event the contractor shall be allowed as full indemnity one month's extra pay (based on the average monthly pay), provided such termination is not due to delinquency on the part of the contractor or his agents.

It is further stipulated and agreed:

1. That during the continuance of this contract, if the Postal interests shall so require, by mutual agreement between the contractor and the Postmaster General, the contract rate of pay hereunder may be changed, but shall never exceed the rate herein provided.

2. That the Postmaster General may, as the needs of the service require, increase or decrease the number of intermediate stops, the number of trips per week, change the termini of the route, dispatch mail on any plane of the contractor flown over the route and change or modify the schedule.

3. That the Postmaster General may, with the consent of the contractor, include Guatemala and Salvador in this route and extend this route from Cristobal, Canal Zone by Cartagena, Colombia, Maracaibo, Venezuela, Port of Spain, Trinidad, Curacao, Dutch West Indies, La Guaira (Puerto

Caracas), Venezuela, Georgetown, British Guiana, to Paramaribo, Dutch Guiana.

4. That this contract is also subject to all the provisions of the advertisement (though not all specifically stated herein) and to the provisions of the Postal Laws and Regulations applicable to this service.

IN WITNESS WHEREOF, The parties hereto have executed this contract.

THE UNITED STATES OF AMERICA

By HARRY S. NEW
Postmaster General D

Signed Aug. 22, 1928
in the presence of
ALICE MUMMERLOFF

PAN AMERICAN AIRWAYS, INC.

by J. T. TRIPPE, *President*
Contractor

Signed August 11, 1928

Witnesses:
ROBERT G. THACH
E. S. SWAGGERTY

Excerpts from Pan American Exhibit No. P-34.

The United States bonds/notes described in the annexed schedule are hereby pledged as security for the performance and fulfillment of the foregoing undertaking in accordance with Section 1126 of the Revenue Act of 1926, approved February 26, 1926 and Treasury Department Circular No. 154, dated April 30, 1926.

PAN AMERICAN AIRWAYS, INC.

By J. T. TRIPPE, *President*
Contractor

Approved as to fact:
CHASE C. GOVE
Acting—Second Assistant
Postmaster General

Approved as to form:
HORACE J. DONNELLY
Solicitor

ERW

SEB

I, Robert G. Thach, certify that I am the Asst. Secretary of the corporation named as contractor herein; that J. T. Trippe who signed this contract on behalf of the contractor, was then President of the said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

ROBERT G. THACH
(Corporate Seal)

Excerpts from Pan American Exhibit No. P-34.

CERTIFICATE OF OATH OF CONTRACTOR

I, the undersigned, being employed in the care, custody and conveyance of the mail as contractor on the route named in the foregoing contract, do solemnly swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post offices and post roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control; and I also further swear that I will support the Constitution of the United States: So help me God.

J. T. TRIPPE, President
PAN AMERICAN AIRWAYS, INC.
Contractor

Sworn to and subscribed before me a Notary Public this 11th day of August, 1928.

E. S. SWAGGERTY
Notary Public

Schedule of United States bonds deposited as collateral security for performance of service on Route No. F. A. M. 5, as described in the foregoing contract.

Title of bonds	Coupon or Registered	Total face Amount	Denomination	Serial No.
Fourth Liberty Loan 4¼% 1933-1938	Coupon with Oct. 15, 1928 and subsequent coupons attached.	$1,000	$1,000	B02401292

Excerpts from Pan American Exhibit No. P-34.

Page 43 (R. 7059).

AVIATION CORPORATION OF THE AMERICAS.

Minutes of Special Meeting of Board of Directors
July 18, 1928.

* * * *

Upon motion duly made and seconded, and after consideration, the following resolution was adopted:

> RESOLVED, that the proper officer or officers of this Corporation be and they hereby are authorized, empowered and directed to cause to be organized under the laws of Peru a corporation having as its general objects and purposes the conduct, management and/or supervision of aviation activities, said corporation to have such authorized capital stock as shall be determined and designated by Messrs. Richard F. Hoyt, C. V. Whitney and J. T. Trippe, and that upon the completion of the organization of such Peruvian corporation, the proper officer or officers of this Corporation be and they hereby are authorized, empowered and directed to subscribe and pay for the capital stock of said Peruvian corporation up to but not exceeding the amount of $10,000, and to transfer or cause to be transferred to such Peruvian corporation the options and concessions for aviation activities in Peru heretofore obtained by Huff-Daland Dusters, Inc., and heretofore transferred to Atlantic, Gulf & Caribbean Airways, Inc. and included in the assets and property of said Atlantic, Gulf & Caribbean Airways, Inc., recently acquired by this Corporation.

Excerpts from Pan American Exhibit No. P-34.

Page 46 (R. 7062).

[Letter evidencing August, 1928 Agreement between Grace and Pan American]

August 31, 1928.

AVIATION CORPORATION OF THE AMERICAS,
100 East 42nd Street,
New York City.

Attention: Mr. J. T. Trippe

Dear Sirs:

This will confirm arrangement under which we will associate for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chile.

A corporation will be formed under the laws of Delaware with a capital stock of $50,000, of which $25,000 will be subscribed by yourselves and $25,000 by ourselves. This corporation will pay to Huff-Daland Dusters, Inc. the sum of $15,000 for an assignment which will convey all of the rights of that company under its present Peruvian mail contract and concession. As soon as possible after the assignment has been completed, operations will be started by this company in Peru and every effort will be made to put the business there on a paying basis.

We will in the meantime cooperate with you in studying the costs of operation on the route from the Panama Canal to Valparaiso and also the advisability of requesting the U. S. Post Office Department to advertise for a mail contract on such route and the terms of such advertisement.

If you determine that it is advisable to bid on a contract for carrying the mails between the Panama Canal and Valparaiso, the Delaware corporation above referred to will be used in such service either by an increase in its capital stock to an amount sufficient to operate on the whole route or as a subsidiary operating in Peru. In either event

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our subscriptions to the stock of the Delaware Company shall be credited at their full amount in the capital setup of the corporation operating the through service. We shall also have a reasonable time after a study of the estimated costs of such operation to determine what interest, if any, we will take in the company making the bid in addition to our initial investment of $25,000, such interest not to exceed, however, more than fifty percent of the total capitalization.

You will have charge of the operation of the service from the Canal to Valparaiso and our houses on the West Coast of South America will be the agents of the company on a reasonable compensation basis, such agency to continue during the life of transportation contracts undertaken by the company.

The details of carrying out the above must, of course, be worked out as we go along. We believe, however, that we have stated broadly the basis of our understanding.

Very truly yours,

W. R. Grace & Co.
Assistant Secretary

WFC:GVB

Excerpts from Pan American Exhibit No. P-34.

Pages 66-73, Inclusive (R. 7080-7)

FOREIGN AIR MAIL CONTRACT

Route No. 9

Cristobal, Canal Zone to Santiago, Chile
Ten Year Period
Beginning April 1, 1929.

CONTRACT FOR FOREIGN AIR MAIL SERVICE.

Route No. F. A. M. 9.

This Contract, made this 2d day of March, 1929, by and between the United States of America (by the Postmaster General) and the Pan American-Grace Airways, Inc., a corporation organized and existing under the laws of the State of Delaware, Contractor;

WITNESSETH, That whereas the said Pan American-Grace Airways, Inc., has been accepted as contractor on route No. F. A. M. 9 in conformity with the advertisement inviting proposals for the service specified herein, issued by the Postmaster General under date of January 31, 1929:

NOW THEREFORE, The said contractor undertakes, covenants and agrees with the United States of America:—

1. To carry mails for the United States of the specified load of not exceeding 800 pounds a trip each way and any excess mails required to be carried in safe and suitable aircraft from Cristobal, Canal Zone, by Buenaventura and Tumaco, Colombia, Esmeraldas and Guayaquil, Ecuador, Talara, Truxillo, Lima, Lomas and Mollendo, Peru, Arica, Iquiqui, Antofagasta, Caldera and Coquimbo to Santiago, Chile, and return, three times a week, by a schedule satisfactory to the Postmaster General, and to perform the services and undertakings in connection therewith as specified in this contract, for and during the term of ten (10) years

beginning April 1, 1929. (The contractor may be permitted to omit service south of Mollendo, Peru, for a reasonable time at the discretion of the Postmaster General, pending completion of operating arrangements.)

2. To receive and deliver the mails at each post office on the route, unless other provision is made by the Department. The contractor also undertakes, covenants and agrees with the United States and binds itself to be answerable in damages to the United States for the proper care and transportation of the mails, and to be accountable for any loss or damage resulting to any such mail or any part thereof by reason of the failure to exercise due care on the part of any of contractor's officers, agents or employees in the custody, handling or transportation thereof.

For the services herein specified when performed in accordance with the provisions of this contract and evidence thereof shall have been filed with the Postmaster General, the said contractor is to be paid by the United States at the rate of $1.80 per mile each way for the specified loan of not exceeding 800 pounds each way, plus the rate of 90 cents per pound per thousand miles or pro rata thereof for greater or less mileage for any excess mails required to be carried in the same aircraft, based on statute miles by the shortest practicable airway distance between points on the route as determined by the Postmaster General; payments to be made monthly and as soon after the close of each month as accounts can be adjusted and settled; said pay to be subject, however, to be reduced or discontinued by the Postmaster General as hereinafter stipulated, or to be suspended in case of delinquency.

It is further stipulated and agreed by the contractor—

1. That in case of failure from any cause to perform any service required by this contract a pro rata deduction shall be made from the compensation of the contractor on account of such omitted service, except that pro rata pay will be allowed for the airway distance flown between

stated points on the route traversed on a partially completed trip if no delay in the mails over the ordinary means of transportation has resulted.

2. That deduction from pay may be made for suffering the mails to become wet, damaged or destroyed, or when a grade of service is rendered inferior to that stipulated in the contract, or for the loss of or depredation upon the mails in the custody of the contractor or its agent, provided the loss is occasioned by their fault, or for other delinquencies, in the discretion of the Postmaster General.

3. That the Postmaster General may annul the contract or impose forfeitures, in his discretion, for repeated failures or for failure to perform service according to contract; for violating the Postal Laws and Regulations; for disobeying instructions of the Post Office Department; for subletting service without the consent of the Postmaster General, or assigning or transferring the contract; for combining to prevent others from bidding for the performance of postal service, and such annulment shall not impair the right of the Department to claim damages from the contractor and its surety.

It is further stipulated and agreed—

1. That if in the opinion of the Postmaster General the development of aircraft should be such as to render the equipment used on the route obsolete, so that it no longer meets the needs of the Department, the Postmaster General may call upon the contractor to provide suitable equipment and in the event of its failure to do so within such reasonable time as shall be given it, may terminate the contract.

2. That mail apartments in all planes shall be made fireproof to the satisfaction of the Post Office Department.

3. That the Department may increase or decrease the number of intermediate stops, or the number of trips per week, and change the termini of the route, dispatch mail on

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any plane of the contractor flown over the route, and modify or change the schedule as the needs of the service require; and the Department may also extend or curtail the route, with pro rata allowance or reduction of pay.

4. That service on this route may be extended at the option of the Post Office Department from Santiago, Chile, by such intermediate points as the Postmaster General may determine, to Buenos Aires, Argentine, and Montevideo, Uruguay, at not exceeding pro rata allowance of additional pay.

5. That the contractor must make its own arrangements for landing fields, lighthouses, radio stations and such other aids to navigation as may be necessary for the proper performance of the service.

6. That this contract covers all mails to and from the United States or its possessions, including parcel post; provided that the contractor shall have the right to make arrangements with intermediate countries for the exchange of local mails between such countries.

7. That during the continuance of this contract, if the postal interests shall require, by mutual agreement between the contractor and the Postmaster General, the contract rate of pay herein may be changed, but shall never exceed the rate herein provided.

8. That the contractor may be permitted to sublet the service to acceptable persons, by permission of the Postmaster General, at not less than the contract rate of pay.

9. That no member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or agreement or to any benefit to arise thereupon.

10. That the contractor shall use flying equipment on the route of United States manufacture, shall use other equipment if practicable of United States manufacture, and

shall employ necessary pilots and flying crews of United States citizenship where practicable to do so.

The contractor warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

This contract is also subject to all the provisions of the advertisement (though not all specifically stated herein) and to the provisions of the Postal Laws and Regulations applicable to this service.

In Witness Whereof, The parties hereto have executed this contract.

The United States of America

By (Signed) Harry S. New,
Postmaster General

Signed March 4, 1929, in
the presence of
(Signed) E. R. White

Pan American-Grace Airways, Inc.,

By (Signed) J. T. Trippe, Agent
Contractor

Signed March 4, 1929.

Witnesses:
(Signed) Wm. P. Palmer
W. F. Cogswell

Excerpts from Pan American Exhibit No. P-34.

The United States bonds/notes described in the annexed schedule are hereby pledged as security for the performance and fulfillment of the foregoing undertaking in accordance with section 1126 of the Revenue Act of 1926, approved February 26, 1926, and Treasury Department Circular No. 154, dated April 30, 1926.

PAN AMERICAN-GRACE AIRWAYS, INC.,

By (Signed) J. T. TRIPPE, Agent
Contractor

Approved as to fact:

(Signed) W. IRVING GLOVER (cog)
Second Assistant
Postmaster General

Approved as to form:

(Signed) HORACE J. DONNELLY
Solicitor

I, W. F. COGSWELL, certify that I am the Secretary of the corporation named as contractor herein; that J. T. TRIPPE who signed this contract on behalf of the contractor, was then Agent of the said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(Signed) W. F. COGSWELL

(Corporate Seal)

Excerpts from Pan American Exhibit No. P-34.

CERTIFICATE OF OATH OF CONTRACTOR

I, the undersigned, being employed in the care, custody and conveyance of the mail as contractor on the route named in the foregoing contract, do solemnly swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post offices and post roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control; and I also further swear that I will support the Constitution of the United States: So help me God.

(Signed) J. T. TRIPPE, Agent
PAN AMERICAN-GRACE AIRWAYS, INC.
Contractor.

Sworn to and subscribed before me a Notary Public this 4 day of March, 1929.

(Signed) CHARLES E. WARREN
Notary Public
My commission expires
Nov. 4, 1930

(Seal)

Schedule of United States bonds deposited as collateral security for performance of service on Route F. A. M. 9, as described in the foregoing contract.

Title of bond	Coupon	Total face amount	Denomination
United States of America, 3⅜% Treasury Bond of 1940-1943	June 15, 1929, and subsequent coupons attached	$10,000	$10,000 No. 6476 F

59

Excerpts from Pan American Exhibit No. P-34.

August 20, 1929

Order

From October 12, 1929, extend service from Santiago, Chile, by Buenos Aires, Argentina, to Montevideo, Uruguay, and return, once a week, including such intermediate points as may be acceptable to the Governments of these countries and designated by the U. S. Post Office Department, the contractor to be allowed $1.80 per statute mile flown each way based on the shortest practicable airway distance between points on the route as determined by the Postmaster General for the specified load of not exceeding 800 pounds each way, plus 90 cents per pound per thousand miles or pro rata thereof for greater or less mileage for any excess mails required to be carried in the same aircraft.

W. Irving Glover
Second Assistant
Postmaster General

Excerpts from Pan American Exhibit No. P-35.

Page 16 (R. 7107)

[Agreement of February 14, 1939.]

1. One of the Grace directors of Panagra (who shall also be a director of Grace) will be elected President of Panagra and placed in responsible charge of the management of the Company. If at any time the Company's affairs are not being conducted to Pan American's reasonable satisfaction, then the President will resign.

2. Pan American will inaugurate on or before April 1, 1939, a second direct trip between Miami and Cristobal, and will maintain an adequate direct connecting service between Miami, or some other U. S. port agreed upon, and Cristobal, connecting with Panagra's through mail schedules. If at any time Pan American shall not comply with the foregoing, then Pan American will cause its directors on the Board of Panagra to take such action as will permit Panagra's applying to the C.A.A. for a certificate to operate this connecting service, provided that, irrespective of any determination made as provided in paragraph 4, Pan American shall not be in any way precluded from maintaining before the C.A.A. that its service is satisfactory and should be continued and that no other service is required in the public interest. With the exception of the second direct trip between Miami and Cristobal above referred to, Pan American shall not be obligated to operate any schedules and services not designated by the Post Office Department as mail schedules but will use their best efforts to have designated as mail schedules any additional trips required to make connection with any increase in Panagra's through mail schedules.

3. It is agreeable to the parties that Pan American-Grace shall continue to utilize the respective services of

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Grace and Pan American and pay service fees in the same proportion as presently allowed, provided that the services to be rendered by the respective parties are satisfactory to Pan American-Grace.

4. Any disputes arising under this general plan and every phase thereof, including, without limiting the generality of the foregoing, determination of "Pan American's reasonable satisfaction" referred to in paragraph 1 above and of "adequate direct connecting service" referred to in paragraph 2 above, which cannot be settled by the Board of Panagra, shall be determined by Messrs. D. S. Iglehart and C. V. Whitney. If Mr. Iglehart or Mr. Whitney shall be unable to act, or unable to agree in connection with any matter arising under the foregoing paragraphs, then, unless otherwise agreed between Grace and Pan American, such matters shall be determined by arbitration by an arbitrator or arbitrators appointed by Messrs. Iglehart and Whitney, or failing such appointment, by three arbitrators, one appointed by Grace, one by Pan American, and a third by these two, and the party adjudged in default shall, at the discretion of the Arbitrator, be given such reasonable time to correct the default as the Arbitrator may fix.

5. This agreement shall continue to February 1, 1944, and thereafter until cancelled by Pan American or Grace on six months' written notice.

Agreed—February 14, 1939.

W. R. Grace & Co.

By Harold J. Roig,
Vice-President.

Pan American Airways Corporation

By J. T. Trippe,
President.

Excerpts from Pan American Exhibit No. P-35.

Page 36 (R. 7127).

July 22, 1941

W. R. Grace & Company,
7 Hanover Square,
New York, N. Y.

Dear Sirs:

A special meeting of the Board of Directors of Pan American-Grace Airways, Inc. was called for June 18th to consider a proposal that Pan American-Grace Airways, Inc. extend its route from the Canal Zone to a terminal in the United States at New Orleans and apply to the Civil Aeronautics Board for the necessary certificate of convenience and necessity.

The proposal that Pan American-Grace Airways, Inc. or, in the alternative, W. R. Grace & Company should apply for a certificate to New Orleans was made in the fall of 1938, prior to the agreement of February 14, 1939, between W. R. Grace & Company and Pan American Airways Corporation. When the matter was again brought up by you in January, 1941, we stated that the position was fully covered by that agreement. When the matter was further raised by you in June, our representatives on the Pan American-Grace Airways, Inc. Board referred this matter to the Executive Committee of Pan American Airways Corporation.

The proposal was considered at ensuing meetings of the Executive Committee. The matter was also considered by our Board of Directors at a meeting on July 1st, in line with the suggestion in Mr. Iglehart's letter of June 20th to Mr. Whitney.

As you have since been advised, our board of directors, after mature deliberation, has unanimously reached the conclusion that it would not be in our Company's interest, or in the interest of our jointly owned company, or in the public interest, for our representatives on the Pan American-

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Grace Airways, Inc. Board of Directors to approve this proposal.

In line with the agreement of February 14, 1939, between W. R. Grace & Company and Pan American Airways Corporation, however, we are glad to submit the matters involved to arbitration as therein provided, and we confirm the request that Mr. Whitney made yesterday to Mr. Iglehart, that such arbitration be held at once.

Very truly yours,

PAN AMERICAN AIRWAYS CORPORATION

By.....

H. PRESTON MORRIS, Secretary

Pages 57-60, Inclusive (R. 7168-71)

November 4, 1941

W. R. Grace & Company,
7 Hanover Square,
New York, New York

Dear Sirs:

We have your letter of October 27 in reply to our letter of October 22. Our letter of October 22 was not, as you characterize it, "a categorical refusal to provide connecting service for Panagra's fourth trip as at present operated." Our letter merely pointed out that this fourth trip is not properly spaced to provide adequate through mail or passenger service, and suggested that Mr. Roig or Mr. Harris confer with our System officials with a view to arranging suitable schedules for four adequately spaced trips per week. As a matter of fact, we have been at all times, and still are, anxious to institute a fourth schedule between Miami and the Canal Zone and it was with a view of presenting the matter in the most favorable light to the Post Office Department that we suggested in our letter of October

22 that Mr. Roig or Mr. Harris work out a revised schedule with our System officials.

The proper officials of the Post Office Department have been asked to approve a fourth direct schedule on a basis which would afford connections with the fourth schedule which has been inaugurated on our joint service. The Department will not approve at this time a fourth direct mail trip between Miami and the Canal Zone to connect with the new schedule inaugurated on the West Coast.

In view of this fact there is no occasion to reply to the other statements contained in your letter, although it should be said that with regard to most of such statements we are in complete disagreement.

We again ask that Mr. Roig or Mr. Harris cooperate in the preparation of an adequate schedule for a through fourth trip. In our opinion an adequate fourth through schedule would move more United States mail than would a trip connecting with the present fourth trip of Pan American-Grace, and would enhance the likelihood of the Post Office Department being willing to designate a fourth direct trip between Miami and the Canal Zone as a regular mail schedule for Pan American Airways. Obviously, the interests of Pan American Airways are prejudiced until this can be accomplished.

There is clearly not the slightest occasion for holding the special meeting of the Board of Directors of Pan American-Grace which has been called for November 5 to consider a proposal that Pan American-Grace extend its route from the Canal Zone to Miami or other terminal or terminals in the United States, and in this connection apply to the Civil Aeronautics Board for the necessary certificate of convenience and necessity.

Substantially the same proposal has been repeatedly advanced by the Grace interests in direct conflict with the agreement under which Pan American-Grace was organized.

Such a proposal was first advanced by the Grace interests in the winter of 1938-1939, when, after extended negotia-

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tions the parties came to an agreement on February 14, 1939, effective until February 1, 1944. Notwithstanding the fact that such agreement disposed of the matter, a like proposal was again advanced by the Grace interests in January, 1941, when a special meeting of the Board of Directors of Pan American-Grace was called for the purpose of considering a proposal that the joint company extend its route to New Orleans. However, Pan American again considered the matter and came to the conclusion that such an extension would not only constitute an unwarranted departure from the prior agreements of the two stockholders, but would not be in the interests of Pan American-Grace itself, and we so advised Mr. Roig.

Six months later, however, another special meeting of the Board of Directors of Pan American-Grace was called, this time for June 18, 1941, to consider the proposal that the joint company extend its route to New Orleans. The matter was again presented to the directors of our Company with the result that they were again unanimously of the opinion that it would be neither in the interests of our Company or of our jointly owned company, or in the public interest, for our representatives on the Board of Directors of Pan American-Grace to approve such proposal. We wrote you under date of July 22, 1941, confirming this, but also advising you that in line with our agreement with you of February 14, 1939, we were glad to submit the matter to arbitration and requested that such arbitration be held at once. As you know, we have never had a reply to our letter of July 22, 1941 (a copy of which is attached hereto).

Nothing has transpired since which could in any way alter the position which we have heretofore taken. The adequate connecting service provided for in the agreement of February 14, 1939 has been maintained and, as stated above, we are not only willing, but anxious to inaugurate a fourth schedule between the Canal Zone and the United States as soon as approval by the postal authorities can be obtained. Such approval is, of course, essential not only

from a business point of view but is also required by our agreement with you of February 14, 1939 which provides that, with the exception of a second trip between Miami and the Canal Zone, Pan American Airways "shall not be obligated to operate any schedules and services not designated by the Post Office Department as mail schedules."

Under these circumstances no useful purpose can be served by further discussion of the proposed extension by our respective representatives on the Board of Directors of Pan American-Grace, particularly these days when our officials are so much occupied with matters having to do with the National Defense. Accordingly our representatives on the Board do not expect to attend the special meeting which has been called for November 5.

We remain willing, however, as we stated in our letter of July 22, 1941, to arbitrate the matters involved in accordance with the provisions of our agreement with you of February 14, 1939, and we repeat the request therein made for such arbitration. We will appreciate it if you will advise us of your position in this respect.

Very truly yours,

PAN AMERICAN AIRWAYS CORPORATION

.....

Evan E. Young
Vice President

Enclosure

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Pan American Exhibit No. P-149.

(R. 7952)

Letterhead of
RICHARD F. HOYT
25 Broad Street
New York City

August 17, 1928.

Mr. Juan Trippe,
Pan-American Airways, Inc.,
100 E. 42nd Street,
New York City.

Dear Juan:

My understanding of our arrangement with the Grace Line is that it is only to cover the South American route from Colon down the west coast, but I notice in the memo. you have submitted to them you include operations in Colombia.

Sincerely,

(Sgd.) DICK

RFH-W

Excerpt from W. R. Grace & Co. Exhibit No. G-14.

(R. 5095)

[From Minute of Board of Directors of W. R. Grace & Co., February 20, 1929.]

A proposal was submitted to create and establish a permanent air service from Panama to Valparaiso on basis of three sailings per week at cost of not exceeding $1,000,000, half of which to be contributed by us and the other half by the Pan American Airways Corporation. According to figures submitted it was estimated that $800,000 of this sum would be spent in actual equipment, airports, landing stations, etc. and that the service would consist of two sections, namely, Panama/Callao and Callao/Valparaiso, each section to have four planes with four extra motors, etc.; balance of $200,000 to constitute working capital. Authority was given to go ahead on this basis.

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APPENDIX IV

ITEM 9

Analysis of Panagra passenger traffic to show the number of passengers originating in and destined to the United States by months from 1938 to the latest month available. Data concerning origin or destination in the United States is not available, but a breakdown between the Eastern and Western Divisions is shown. The Western Division figures include passengers originating in and destined to points in Central America.

In the total number of passengers carried on Panagra, which is also shown for the sake of comparison, all passengers stopping over longer than the regular overnight stops are counted again each time they continue their trip.

		SOUTHBOUND			NORTHBOUND		
	Total no. Pass. on Panagra Route	Pass. orig. in Eastern Division	Pass. orig. in Western Division(1)	Total U. S. S/B Traffic orig. in U. S.	Panagra Pass. destined to Eastern Division	Panagra Pass. destined to Western Division(2)	Total U. S. N/B Traffic destined to U. S.
1938							
Jan.	714	....	....	51	....	....	45
Feb.	604	....	....	39	....	....	31
Mar.	866	....	....	34	....	....	38
April	644	....	....	38	....	....	24
May	662	....	....	28	....	....	44
June	565	....	....	34	....	....	41
July	611	....	....	39	....	....	37
Aug.	553	....	....	18	....	....	50
Sept.	494	....	....	28	....	....	30
Oct.	647	....	....	38	....	....	40
Nov.	717	....	....	51	....	....	40
Dec.	775	47	16	63	46	13	59
1939							
Jan.	740	36	14	50	33	12	45
Feb.	684	21	16	37	34	6	40
Mar.	806	23	21	44	23	12	35
April	723	25	14	39	37	8	45
May	680	25	11	36	32	9	41
June	703	35	17	52	40	20	60

(1) These figures include passengers originating in Central America. Figures for U. S. Passengers only are not available for the Western Division.

(2) These figures include passengers destined to Central America. Figures for U. S. Passengers only are not available for the Western Division.

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APPENDIX IV

ITEM 9

	SOUTHBOUND				NORTHBOUND		
	Total no. Pass. on Panagra Route	Pass. orig. in Eastern Division	Pass. orig. in Western Division(1)	Total U. S. S/B Traffic orig. in U. S.	Panagra Pass. destined to Eastern Division	Panagra Pass. destined to Western Division(2)	Total U. S. N/B Traffic destined to U. S.
1939							
July	932	41	14	55	45	13	58
Aug	829	32	8	40	38	16	54
Sept	821	32	25	57	54	26	80
Oct	895	36	21	57	27	22	49
Nov	907	31	17	48	33	24	57
Dec	907	39	30	69	47	21	68
1940							
Jan	952	42	29	71	34	16	50
Feb	1086	42	36	78	51	20	71
Mar	1212	52	41	93	51	20	71
April	1083	40	21	61	58	26	84
May	990	46	25	71	75	18	93
June	1057	60	31	91	64	32	96
July	1275	57	48	105	83	22	105
Aug	1374	72	24	96	77	30	107
Sept	1320	52	23	75	97	15	112
Oct	1365	63	24	87	90	17	107
Nov	1404	72	26	98	82	19	101
Dec	1482	64	18	82	98	22	120
1941							
Jan	1538	78	14	92	65	18	83
Feb	1756	80	54	134	78	11	89
Mar	2066	47	35	82	92	40	132
April	2110	65	19	84	79	40	119
May	2082	75	19	94	118	40	158

(1) These figures include passengers originating in Central America. Figures for U. S. Passengers only are not available for the Western Division.

(2) These figures include passengers destined to Central America. Figures for U. S. Passengers only are not available for the Western Division.

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APPENDIX IV

ITEM 9

	SOUTHBOUND				NORTHBOUND		
	Total no. Pass. on Panagra Route	Pass. orig. in Eastern Division	Pass. orig. in Western Division(1)	Total U. S. S/B Traffic orig. in U. S.	Panagra Pass. destined to Eastern Division	Panagra Pass. destined to Western Division(2)	Total U. S. N/B Traffic destined to U. S.
1941							
June	2302	85	32	117	85	22	107
July	2667	56	47	103	98	23	121
Aug.	3324	56	32	88	98	45	143
Sept.	3539	61	25	86	105	63	168
Oct.	3760	65	24	89	97	53	150
Nov.	3188	77	25	105	96	25	121
Dec.	3314	45	29	74	107	62	169
1942							
Jan.	3164	79	69	148	104	33	137
Feb.	3171	104	67	171	113	39	152
Mar.	3591	124	100	224	155	64	219
April	3578	159	88	247	207	78	285
May	4179	164	119	283	220	113	333
June	3826	239	83	322	235	90	325
July	4407	229	100	329	182	51	233
Aug.	4917	197	75	272	236	67	303
Sept.	4873	219	113	332	268	68	336
Oct.	5433	247	60	307	192	84	276
Nov.	5117	291	55	346	184	51	235
Dec.	---	---	---	---	---	---	---

(1) These figures include passengers originating in Central America. Figures for U. S. Passengers only are not available for the Western Division.

(2) These figures include passengers destined to Central America. Figures for U. S. Passengers only are not available for the Western Division.

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IN THE

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

No. 19520.

W. R. GRACE & CO.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,
PAN AMERICAN AIRWAYS CORPORATION,
PAN AMERICAN AIRWAYS, INC.,
EASTERN AIR LINES, INC.,
NATIONAL AIRLINES, INC.,
CHICAGO AND SOUTHERN AIR LINES, INC.,
TACA, S. A.,
DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA,

and

PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

APPENDIX TO

BRIEF OF EASTERN AIR LINES, INC., RESPONDENT

GAMBRELL & WHITE,
Attorneys for Eastern Air Lines, Inc.

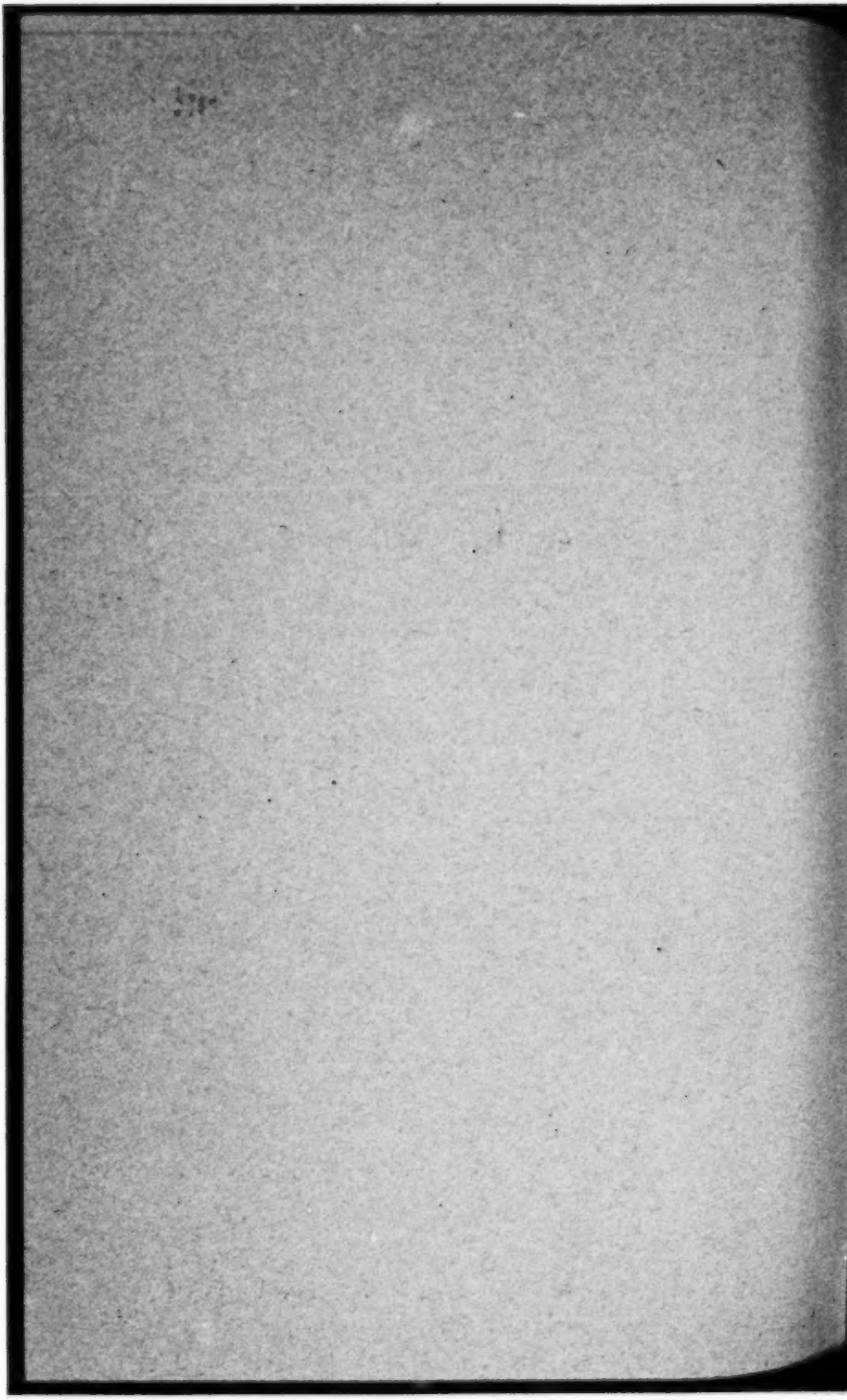
E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
of Counsel.

10 Rockefeller Plaza,
New York, N. Y.

September 29, 1945.

UNITED STATES CIRCUIT COURT OF APPEALS
FILED
OCT 30 1945
A. M. BELL CLERK
SECOND CIRCUIT

APPEAL PRINTING CO., INC., 240 CEDAR ST., NEW YORK, WO 2-2040



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II

Appendix A

Excerpt from Eastern's Brief to the Board on Motion to Dismiss, dated January 14, 1944, page 17, line 18, to page 20, line 12, Inclusive (R. 8648-8651)

"II.

"SECTION 401 (h) OF THE ACT, UNDER ANY REASONABLE INTERPRETATION, DOES NOT AUTHORIZE THE COMPULSORY NEW SERVICE UNDER CONSIDERATION IN THIS CASE.

"Section 401 (h) authorizes the Board on its own motion to 'alter, amend or modify' an existing certificate. No power is given to 'extend' a route. It should require no argument to demonstrate that authorization of a 1200-mile route between the United States and the Canal Zone would not merely 'alter, amend or modify' Panagra's existing certificate. Such a route would be as long as Eastern's Route 6 or Route 10, and would be greater than the entire system mileage of several air carriers.

"The Board has recognized that Section 401(h) confers only a very limited power to amend certificates. In its Annual Report for 1942, at page 15, the Board said:

> '. . . the Board has power under section 401(h) of the Act to require "amendments" to certificates on its own initiative, without application by the carrier, after notice and hearing. The word "amendment" is vague and *carries with it a limited concept.* Consequently, it has been argued that the Act now appears to contemplate that the Board shall await the filing of applications in order to authorize *any substantial new service*' (Italics supplied).

Clearly a 'limited concept' of amendment does not contemplate a 1200-mile new route.

"The word 'alter' has been defined, judicially and otherwise, as meaning 'to change without destroying the

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identity of the thing changed'. *Smith* v. *United States*, 74 F. (2d) 941, 942 (C.C.A. 5th, 1935). Webster's Dictionary shows that the three words—'alter', 'amend' and 'modify'—are synonymous, each containing the limitation that the identity of the thing changed shall not be destroyed.

"It is unnecessary to argue extensively, or to refer to any of the evidence introduced in this proceeding, to demonstrate that the authorization for Panagra of a route between the United States and the Canal Zone would change the 'identity' of Panagra. Grace and Pan American agree on this point. At page 5 of the petition of Grace under Docket 707, Grace asserts that authorization of the new route between the Canal Zone and the United States 'would give the Panagra Route the standing of an independent American international air line with a terminal in the United States such as every other comparable American foreign air service has.' Clearly Grace's purpose in requesting the institution of this proceeding was to change the 'identity' of Panagra from that of a subordinate and integral part of the Pan American world monopoly to that of an independent international airline.

"At page 3 of Pan American's 'Answer' under Docket 779, Pan American asserts:

> 'The capital invested in Pan American-Grace definitely was not dedicated to the purpose of engaging in air transportation between the United States and the Canal Zone. On the contrary, Pan American-Grace was organized as a joint venture on the part of its two founders *for the limited purpose of engaging in air transportation on the west coast of South America.* The capital invested in it was devoted to that purpose and to that purpose alone.'

"It is clear from the pleadings that Panagra is now engaged strictly in Latin American air transportation, and also provides connections for the services of Pan American to and from Miami and Brownsville. Panagra is now

in competition with Grace Line, Inc., wholly owned subsidiary of Grace, Panagra's co-owner, for traffic along the west coast of South America. It is also in competition with its other co-owner, Pan American, for traffic between the Canal Zone and Buenos Aires. If Panagra were permitted to operate to and from the United States, it would be in competition with *both* of its owners for traffic all of the way from New York and other northern points to the South American points jointly served. Aside from the fact that such competition by a controlled subsidiary is contrary to the Civil Aeronautics Act and the anti-trust laws, it is apparent that authorization of such service for Panagra would substantially change Panagra's 'identity', its purpose and its functions, and would be a 'substantial new service' in conflict with the 'limited concept' which the Board has said the word 'amendment' connotes.

"In this connection it may be noted that even the dissenting justices in *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co., supra,* unquestionably would agree that the new service under consideration for Panagra would constitute more than an 'extension' of Panagra's present service. At 288 U. S. page 44, the dissenting opinion states that the word 'extension' does not 'fairly connote a prolongation so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal.' The dissenting members of the Court concluded that a 1.2% addition to the system of the railroad in that case would not be so great as to change the character or identity of the thing changed. It seems reasonable to assume, however, that, even in the minds of the dissenting justices, a 1200-mile extension of an airline into a country which it does not presently serve and which would become its primary source of traffic, would result in a change in identity or character of the airline. The proposed new authorization for Panagra would be more than even an 'extension.' *A fortiori* it would be more than an alteration, amendment or modification (in the language of Section 401(h) of the Act) of Panagra's certificate."

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Appendix B

Letter of Counsel for Grace to the Board (R. 8846J-8846K)

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL
Sixty-Three Wall Street
New York

January 4, 1944

"Re: Panagra Route Extension Docket No. 779

"Dear Sirs:

"We are in receipt of a copy of a letter of Mr. Gambrell, counsel for Eastern Airlines, dated December 27, 1943.

"Mr. Gambrell lists five points which he intends to brief and argue in support of Eastern's motion to dismiss this proceeding.

"Points 1 and 5 raised by Mr. Gambrell obviously do not raise any question of the Board's jurisdiction, but involve only the issue as to whether the Board, granting that it has jurisdiction, should amend Panagra's certificate so as to provide for the extension of the route. Inasmuch as the Board has denied the cross motion of W. R. Grace & Co. to join the argument on the jurisdiction question with the argument on the merits, we believe it is clear that argument on Points 1 and 5 listed by Mr. Gambrell have no proper place in the argument now scheduled by the Board.

"Point 4 raised by Mr. Gambrell relates solely to the application of Section 408 of the Civil Aeronautics Act in this proceeding. While this does raise in part a question of law, it is an entirely different question from the question as to whether the Board has jurisdiction to order the route extension. Inasmuch as we have not been advised by the Board that the issue of the application of Section 408 is to be considered at this time, we assume

that this issue is likewise not properly brought before the Board on this pending argument.

"Point 2 involves no question of jurisdiction of the Board, but solely a matter of its discretion, which the Board has, we believe, already conclusively determined.

"This leaves only the third point raised in the letter. Even this fails to correctly state the issue now to be argued before the Board. The question is not whether the Board lacks power to grant a new route to Panagra for which it has not applied, but rather whether the Board has the power to amend Panagra's certificate so as to provide for the extension of its route from the Canal Zone to a terminal in Florida.

"We believe it to be in the interests of proper and expeditious procedure that the issue before the Board on the argument now set for January 31, 1944, be so defined that irrelevant and extraneous considerations such as those raised in Mr. Gambrell's letter will not be brought into the argument and the briefs. This should be done well in advance of the time set for the filing of briefs.

Respectfully yours,

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL
Attorneys for W. R. Grace & Co."

"Civil Aeronautics Board
Commerce Building
Washington 25, D. C.
(CC to all parties)"

Appendix C

Excerpt from Oral Argument Before the Board in Behalf of Eastern (Stenographic Report, page 33, line 18, to page 34, line 3; R. 8440-8441)

"Public Counsel has suggested in his brief that we should discuss purely the legal question here and not refer to the facts at all.

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"Now, I don't think that this Board can decide a question of this character in a vacuum. There is no court that I know of that has ever decided a case without reference to the facts, and I think we have to refer to the facts in order to get the legal question in proper perspective.

"The question here is whether you are going to dismiss this proceeding, not whether you are going to dismiss some other proceeding some time or all proceedings of this type, but just whether you are going to dismiss this particular proceeding, Docket 779, so I think it is necessary to look at the facts."

Appendix D

Excerpt from Brief of Grace to Board, dated January 15, 1944, pages 34-39 Inclusive (R. 8619-8624)

"D. The amendment proposed in this case is reasonable

"The following facts, taken from the Record in Docket 779 amply demonstrate the reasonableness of an exercise by the Board of its power to 'require' Panagra to come through to a Florida terminal.

"1. Panagra's Existing Service.

"Panagra's growth and expansion over the ten year period 1933 to 1942 effectively demonstrate not only that it is able to undertake additional service without difficulty, but also that the proposed extension is merely a further development in Panagra's natural growth. The following is a brief summary of this development (795-9; Ex. PG-4, Item 5):

VIII

	1933	1942
Route Miles	4551.5	8551.2
Airplane Miles	1,162,394	4,033,194
Passenger Miles	4,508,720	43,528,646
Frequencies	Twice weekly	Daily (plus additional trips)
Commercial Revenue	$426,000	$4,788,000
Investment in Aircraft & Ground Facilities	$955,000	$3,791,000

"During this period, the following additional increases are reflected:

Average ton miles	355%
Used ton miles	680%
Passenger revenue	1046%
Express & freight revenue	3160%

"2. Pan American's Traffic on the Miami-Canal Zone Route.

"The proposed service is on a route on which there already is extremely heavy traffic, with unlimited possibilities of further development. This is apparent from the following statistics on the volume of passenger traffic, mail and express on the Miami-Canal Zone route as operated by Pan American during the years 1940-42 (Exs. P-2; P-14):

Year	Total Passengers Carried	Pounds of Mail	Pounds of Express
Southbound			
1940	1241	87,966	197,522
1941	2273	135,764	206,308
1942	6053	422,809	785,691
Northbound			
1940	1368	64,907	41,435
1941	2315	116,258	43,106
1942	7062	335,370	79,611

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"3. Extent of Proposed Service.

"The proposed service is not over a new and uncharted course where unknown navigational, meteorological and other problems might be encountered. It is, as has previously been mentioned, but one stop beyond Panagra's present terminal, involving largely an over-water operation.

"The additional mileage represents an increase, on a through operation* between Florida and the Canal Zone, of 1,150 miles (Ex. PG-4, Item 30, p. 12).** This is by no means a formidable addition for a carrier whose route miles have increased from 4,463 in 1929 to over 8,800 in 1943. As previously illustrated, *supra* pp. 9-10, the character of the proposed operation and not solely the mileage involved is important.

"The exhibits are based upon a proposed daily service, which is the same frequency as Panagra now operates on its international trunk route.

"4. Expenditure Required.

"With respect to the expense attendant upon the projected service, the exhibits show (Ex. PG-4, Item 30, pp. 12-13 and Item 34) that the total investment for equipment will amount to $835,000. In connection with this estimated expense, the following facts are significant to note:

"(1) The estimates given are of course based upon the high price level prevailing in 1943.

"(2) Some of the estimated capital expenditures (e.g., for communications equipment) might be reduced by joint facilities arrangements. (452)

"* This refers to a non-stop operation between Florida and the Canal Zone with DC-4s or other available equipment of that type. DC-4 statistics were used in the exhibits. Ex. PG-4, Item 34, page 3 states, however, that 'whatever modern and suitable type of four-motored flying equipment might be available for this operation should be used. It is believed that the corresponding operating figures would be no less favorable than those submitted herein.'"

"** Unless otherwise indicated, all statistics given relate to a terminal at Miami, Florida. Corresponding figures for Tampa will be found in the exhibits."

"(3) The relatively small amount involved is attributable to the fact that there will be fewer stations per route mile on the proposed extension than on the present operations, namely, only one in Florida, and one in Kingston (on the DC-3 operation only), with some possible additional expenditures at Balboa (1461).

"5. Financial Condition of Panagra.

"Panagra is in a strong position to undertake this estimated expenditure. Comparing the financial record of Panagra with any commercial airline in the United States, it is such, in the opinion of the President of the company, that 'there is not any airline that can match it' (798).

"As of the end of 1942 the company had cash and Government bonds of $2,592,000, total gross assets of $10,754,000 and a net worth, exclusive of good will of $3,900,000. During the ten-year period 1933 to 1942 the company capitalized the sum of $2,850,000 and built up a miscellaneous reserve of $399,000 and a self-insurance reserve of $1,201,000 (796-8; cf. Exs. G-22, G-23).

"The relatively small amount of the capital expenditure required for the permanent operation between Florida and the Canal ($835,000) is apparent when compared with these figures. Moreover, it is less than half the estimated operating revenue for one year.

"6. Estimated Revenue,
Expenses and Return Expected.

"The secure position of the company from a financial standpoint and the estimate of expected revenue from the proposed operation, demonstrate the absurdity of any argument that an order requiring the extension would be a deprivation of property in violation of the due process clause.

"The estimates of Panagra's Vice-President and Comptroller envisage an annual revenue of $1,929,500 on

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the basis of daily service with DC-4s between Miami and Balboa. The estimated annual operating expenses are $1,686,700.

"This results in an estimated operating profit, before United States mail but including revenue for the carriage of foreign mail northbound, in the amount of $242,800* (PG-4, Item 34, p. 3). Of course, the rates which Panagra would receive for carrying southbound mail (including any subsidy) will be determined by the Board. In accordance with established practice, however, such rates would be fixed at a point which would cover Federal taxes and a return on the investment, as well as any possible deficit from operations.

"These estimates of revenue to be derived by Panagra on the suggested route are supported by conservative estimates of the passenger, mail and express traffic to be carried by Panagra (49-50; Ex. PG-4, Items 16 and 20).

"As a result of the remarkable growth of Panagra during the past ten years or so, it is the opinion of the operations executives of Panagra that the company is in a better position today than ever before to add more mileage, because it is starting from a higher basis and with a larger organization, with the result that the proposed service will cause no increase in the general and burden expenses of operations (453-4; 601-2).

"7. Advantages to the Public.

"Over 75% of Panagra's passengers carried south from the Canal Zone are received from Pan American at the Canal and approximately the same percentage of those brought to the Canal northbound are transferred to Pan American's respective divisions for carriage to destinations in the United States (Ex. PG-1, Items 1 and 3).

---

*On the DC-3 operation from Miami, the estimated operating profit is $37,100. If the operation were from Tampa, instead of Miami, there would be an operating deficit of $10,200 (DC-4 operation) and $181,300 (temporary DC-3 operation)."

"Numerous advantages will accrue to these passengers from an extension of Panagra's route to a Florida terminal.

"The advantage of the speedier service on the DC-4 operation which would carry through passengers to Lima from Miami in seventeen hours is, of course, obvious. Under the proposed schedule, the Panagra plane would leave Miami at 00:00, arrive in Balboa at 7:15 and be in Lima at 17:05 (PG-4, Items 17-18).

"The manifold advantages from the point of view of passenger comfort and convenience on a through service have been abundantly developed in the record. They include:

> "(a) Fundamentally, and without stating at length the serious inadequacies of Pan American's connecting service, it would relieve the traveling public of all the disadvantages that inhere in any connecting service and would facilitate and improve the services between the United States and the eight important South American countries on Panagra's route (e.g., a number of delays in arrival are inevitable, being caused by weather, motor trouble, and other factors). Such delays are an inherent defect of a connecting service. (223) Apart from the difficulties caused by Pan American's numerous delays (Exs. P-25, P-25A, P-25B), even Panagra delays are proof of the advantages of a Panagra direct through service. (792)
>
> "(b) It would eliminate passenger discomfort and inconvenience on a night flying operation. A connecting service would require passengers to arise some time before the arrival at Balboa, and transfer from one aircraft to another, instead of continuing the trip as on a through operation, either asleep or awake, as the passengers might choose.
>
> "(c) Panagra rather than Pan American would control reservations on the Canal Zone-Florida sector, thus preventing international through passengers from being blocked out by local sector traffic (804).

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"(d) The competition provided by the extension would result in improved service generally, as illustrated by the expedition of Pan American's passenger handling at Brownsville since the advent of the competition of American Airlines on the Mexico service (400).

"In addition to these advantages to the traveling public, there would be the following advantages to Panagra itself:

"(a) A through service would make possible a *maintenance base* in the United States, nearer and more accessible to the source of supply of skilled labor and of materials and parts—providing an item of economy through the elimination of heavy inventory, rush shipments, etc. Further savings could be obtained on customs duties. It would enable the technical staff to be in closer contact with other experts in the U. S. on special problems that arise in the course of operations. (177-8)

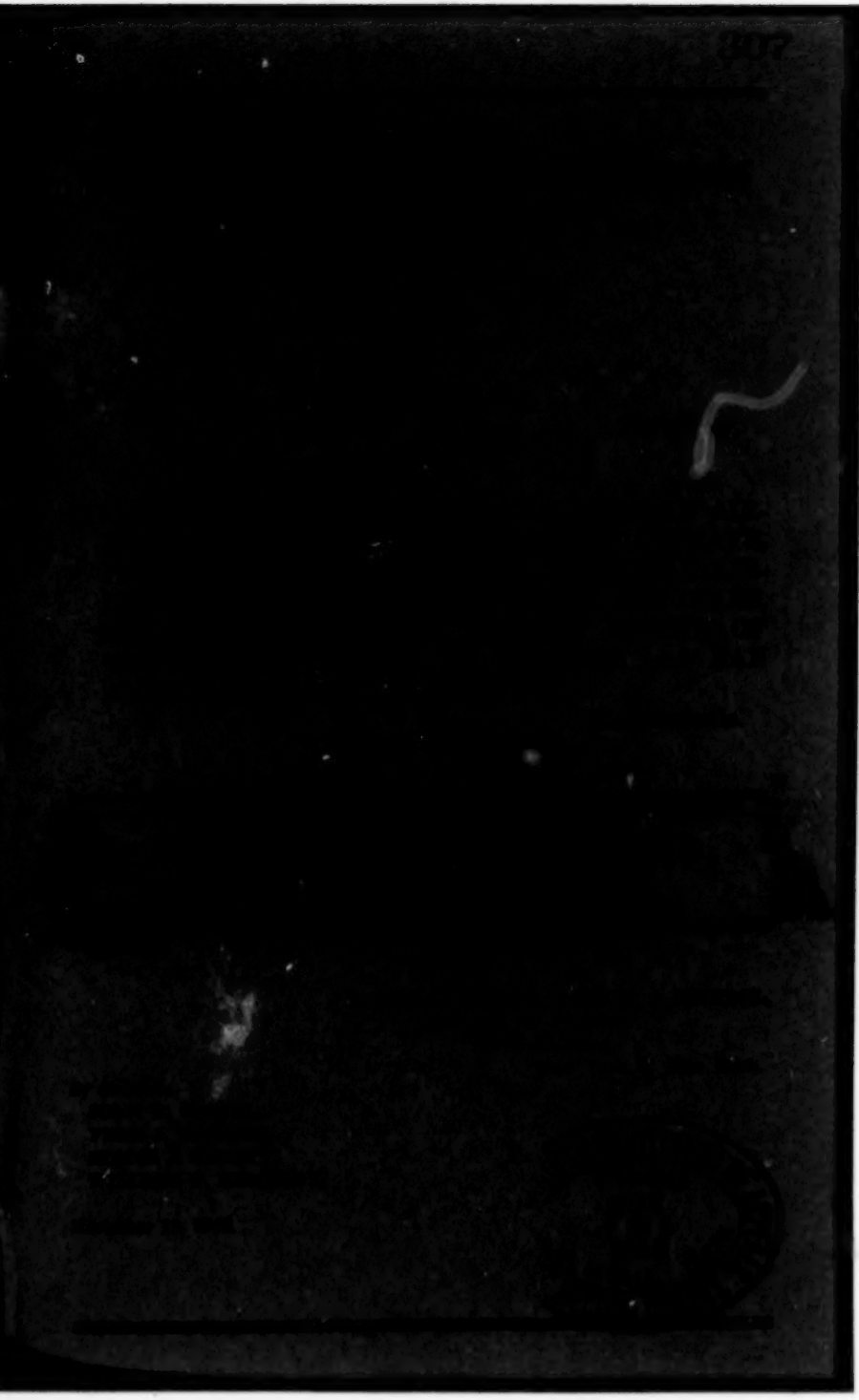
"(b) It would assist in the procurement of skilled pilots who would be attracted by the possibility of an occasional layover in the United States (177-8).

"(c) It would make for a more economical *utilization of equipment.* (356-7)

"(d) It would result in a *generation of traffic* because of the elements of increased capacity and frequency and of competition. (440-1) The fact that transportation via Panagra could be sold on a through basis would also be helpful in the generation of traffic (399-400).

"(e) It would facilitate *freight service.* The fewer transfers of freight, the more efficient and less expensive the service becomes. Every time cargo has to be handled the package problem becomes serious and the expeditious character of the service is retarded (806)."

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APPENDIX

Excerpt from Direct Examination of Harold J. Roig

(S. M. 754; R. 1104)

Q. Now, with that background in mind, will you tell us how Panagra's operations have been carried on by its own organization? I mean by that: have they been carried on by the Panagra organization as an independent operating entity? A. Yes, they have.

Q. In other words, Mr. Roig, is it a fair statement to make that while the ownership interests have rendered valuable service to Panagra under various headings, that Panagra has carried on its own business and run its own airline? A. Oh, yes. Panagra has had its own operating officials, it has had its own equipment, it has had its own personnel staff, its own maintenance, its own radio, everything that a self-poised independent operating airline has. It has had in addition the benefit of the services of its two parent companies, and they have performed some of the functions which, if they had not performed them, Panagra would have had to do itself, but those functions have never interfered with Panagra's independence of operation.

Excerpt from Cross Examination of Harold J. Roig by Public Counsel

(S. M. 1196-8; R. 1449-51)

Q. Well, in 1940, Panagra contributed an additional amount in the sum of about $40,000 to advertising through the Pan American advertising, did it not? A. Well, that works this way: Panagra, beginning, I think, about 1940, has done some advertising of its own.

Q. In the United States? A. In the United States. It always has advertised abroad. At or about that time we began some advertising in the United States. That advertising was paid for by Panagra. It was not included in the fee paid Pan American and was not paid for by Pan

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American. That was an additional expense incurred by Panagra.

In the preparation of that advertising we used our own organization, an outside advertising agency, and had the benefit of the assistance of Pan American's advertising department. That was strictly 100 percent Panagra advertising.

* * * * * *

Q. Now what type of advertising was this $40,000 to which I referred? A. That was magazine advertising, three-color work in full pages.

Q. System or Panagra? A. That was Panagra advertising.

Q. Itself? A. Panagra advertising. In addition to magazine advertising, newspaper advertising—Panagra ran some newspaper advertising this past year—there is also the question of folders. One of the questions that we have succeeded in arranging with the Pan American publicity department was that a certain amount of their fee should be spent in the preparation of folders, and that kind of publicity matter, related specifically to Panagra, and that has been done, and that represented definite progress.

Exhibit G-120.

(R. 5814)

May 29, 1942

Thomas A. Morgan, Esq.,
Chairman, Executive Committee,
Pan American Airways Corporation,
Chrysler Building,
New York City.

My dear Mr. Morgan,

I am informed that Pan American Airways have engaged a new advertising agency and that an advertising campaign is proposed with the general objective, in effect, of selling the idea of the efficiency and desirability of world monopoly in American foreign aviation. I understand that the last Annual Report of Pan American Airways Corporation, featuring "Pan American World Airways System", is indicative of the general theme of this campaign.

Although Pan American-Grace Airways, Inc. is an independent company with its own directors and officers, the Annual Report referred to assumes to list Pan American-Grace Airways, Inc. along with various divisions and 100% subsidiaries of the so-called Pan American Airways System. It also shows as the so-called "Executive Officers" of the "Pan American Airways System" (and that in a manner clearly intended to indicate their seniority to the officials of the divisions and companies listed as a part of this System) various individuals who are, I understand, the officers of Pan American Airways Corporation or of Pan American Airways, Inc.

We do not subscribe to the idea of world monopoly in American foreign aviation. Pan American-Grace Airways, Inc. is not a subsidiary of any "World Airways System". For these reasons as well as because of the pending proceedings before the Civil Aeronautics Board, we must re-

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quest that Pan American-Grace Airways, Inc. be not included in the proposed advertising campaign in any form implying its acquiescence in the above thesis or its being a part of any such monopoly. Moreover, we must request that all such representations of Pan American-Grace Airways, Inc.'s status as that in the above mentioned Annual Report whether in publicity, advertising, annual reports or other publications of Pan American, be discontinued as we consider such statements to be unwarranted and damaging to Pan American-Grace Airways, Inc. and to its standing as an independent company.

Very truly yours,

(Sgd.) D. S. Iglehart.

Exhibit G-159.

(R. 5925)

PAN AMERICAN-GRACE AIRWAYS

I lunched today with Richard Hoyt. We agreed that we would authorize the employment of MacGregor as Executive Vice-President of this Company at a salary of $18,000.—per year and that we would ask him as promptly as possible to lay out an organization and plan of action—this to be submitted to the Executive Committee for their modification or approval. I stated that I would like to have an opportunity of discussing it with him in case there was a failure on the part of our men to agree on a line of action.

I indicated that I hoped MacGregor would favor the naming of Jacob as one Vice-President and of Harris as another. We decided that MacGregor should be instructed to use the Grace organization in South America as far as he found it practicable to use it in the same way as he was to use the Pan American Airways in New York as far as he found it practicable to do so.

It was understood that he would say to Mr. Trippe and I would say to Mr. Patchin that it was to be understood that MacGregor was to run this business in the same way as Trippe was running the Pan American Airways, that he was to report to his Executive Committee but that all actual administrative business responsibility should be placed directly on MacGregor's shoulders and that he should be given all the prerogatives necessary to the successful carrying of this responsibility.

April 3, 1929.

D. S. I.

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[fol. 20] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19520

W. R. GRACE & Co., Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Aiways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents

Appendix to Supplemental Brief of W. R. Grace & Co., Petitioner

Cahill, Gordon, Zachry & Reindel, Attorneys for Petitioner, 63 Wall Street, New York 5, New York.

Of Counsel: John T. Cahill, Fred J. Knauer, Elmer J. Kelsey, William F. Kennedy.

Filed: December 10, 1945.

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[fol. 22] APPENDIX A

BEFORE THE CIVIL AERONAUTICS BOARD, WASHINGTON, D. C.

Docket No. 707

In the Matter of the Petition and Complaint of W. R. GRACE & Co., for the Alteration, Amendment and Modification of the Certificate of Public Convenience and Necessity of Pan American-Grace Airways, Inc., so as to Name a Point Within the United States as a Terminal Thereof Pursuant to Section 401 (h) of the Civil Aeronautics Act of 1938, as Amended

Communications from the Board with respect to this Petition should be sent to the following:

A. Garni, First Vice-President, W. R. Grace & Co., 7 Hanover Square, New York City, New York; and
Whiteford, Hart & Carmody, 815 Fifteenth Street, Northwest, Washington, D. C.

[fol. 23] BEFORE THE CIVIL AERONAUTICS BOARD, WASHINGTON, D. C.

In the Matter of the Petition and Complaint of W. R. GRACE & Co., for the Alteration, Amendment and Modification of the Certificate of Public Convenience and Necessity of Pan American-Grace Airways, Inc., so as to Name a Point Within the United States as a Terminal Thereof Pursuant to Section 401 (h) of the Civil Aeronautics Act of 1938, as Amended

This petition and complaint of W. R. Grace & Co., represents to the Civil Aeronautics Board as follows:

1. The full name and address of the Petitioner is W. R. Grace & Co., 7 Hanover Square, New York, New York.

2. Petitioner, a Connecticut corporation, has been engaged in business in Latin America, particularly the countries on the West Coast of South America and Central America, for nearly a century. In 1929, jointly with Pan American Airways Corporation, hereinafter referred to as

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[fol. 24] "Pan American,"* Petitioner formed Pan American-Grace Airways, Inc., hereinafter referred to as "Panagra," and has at all times since owned 50% of the stock of Panagra, the other 50% being owned by Pan American. Petitioner (and its subsidiaries) have represented Panagra since its organization in all countries of the West Coast of South America. Petitioner is a very large user of Panagra's service for mail and passengers. Various of the officers and directors of Petitioner, who are also officers and directors of Panagra, take a direct and active part in all matters pertaining to the management and administration of Panagra's business.

3. Panagra is an air carrier within the meaning of the Civil Aeronautics Act of 1938, as amended, and at the present time holds a certificate of public convenience and necessity issued to it by the Civil Aeronautics Board, which authorizes it to engage in air transportation of persons, property and mail as follows:

> Between the terminal point Cristobal, Canal Zone, the intermediate points Cali, Colombia; Quito, Esmeraldes, Manta, Salinas, and Guayaquil, Ecuador; Talara, Chiclayo, Lima, and Arequipa, Peru; Arica, Antofagasta, and Santiago, Chile; Mendoza and Cor-Arequipa, Peru, and the terminal point Buenos Aires, Argentina, via the intermediate points Arica, Chile; La Paz, Oruro, and Uyuni, Bolivia; Salta, Tucuman, and Cordoba, Argentina, and also between the intermediate point Guayaquil and the terminal point Lojo via the intermediate point of Cuenca, Ecuador; and also between the intermediate point Oruro, Bolivia, [fol. 25] and the terminal point Corumba, Brazil, via the intermediate points Cochabamba, Sucre, Vallegrande, Santa Cruz, Concepcion, San Ignacio, San Jose, Robore, Puerto Suarez, Bolivia.

4. Panagra was incorporated under the laws of Delaware, February 21, 1929, for the purpose of engaging in

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* Pan American Airways Corporation is the parent corporation of the Pan American System, of which Pan American Airways, Inc., is the main operating subsidiary. Whenever "Pan American" is used herein, it refers to Pan American Airways Corporation or Pan American Airways, Inc., as the meaning may require.

commercial air transportation. In March, 1929, it was awarded Foreign Airmail Contract for Route No. 9 by the United States Post Office Department. It was the first American airline to operate a regular scheduled air transport service to Buenos Aires with connections to the United States. Its route runs from the Panama Canal Zone along the West Coast of South America to Arequipa, Peru, where one branch continues along the West Coast to Santiago, Chile, and thence across the Andes to Buenos Aires and the other proceeds across Bolivia and Central Argentina to the same destination. Commencing operations in Peru, by July, 1929, Panagra had extended its route to the Canal Zone on the North and to Santiago, Chile, on the South. By October 12, 1929, service had been extended over the Andes and across the Argentine to Buenos Aires. In 1935, an extension of the route from Arica, Chile, to La Paz, Bolivia, was inaugurated, thus connecting Bolivia with the international airway. In July, 1937, the route between Santiago, Chile, and Buenos Aires was diverted to include the important city of Cordoba. In April, 1937, the so-called "Diagonal Route" was instituted, being an extension from La Paz through the central portion of the Argentine to [fol. 26] Buenos Aires via Cordoba, serving en route the important cities of Salta and Tucuman, Argentina. In July, 1938, the route which had thus far been operated between Cristobal and Guayaquil over water, was diverted inland with landplane operation to serve Cali, the principal commercial city in western Colombia. In March, 1939, the route between Cali and Guayaquil was further modified to include Quito, the capital of Ecuador. In 1940 and 1941, in connection with the elimination of German services on the West Coast of South America, hereinafter referred to, Panagra has added to its route extensive local services in Ecuador, a new international service across Bolivia to the Brazilian border where it makes connection with Panair do Brasil at Corumba to provide a second South American trans-continental service and, by management agreement with Lloyd Aereo Boliviano, has assumed management responsibility for the important local services of that company in Bolivia. As a result of all this development and expansion, Panagra is at present operating about 8,000 route miles,—more route mileage than that of any domestic airline in the United States.

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5. Coincident with this expansion of its route Panagra has also, particularly during the last two or three years, greatly increased its frequencies, reduced its flying time between terminals and increased its traffic. Frequencies over the entire route, have been doubled, from two to four round trips per week. Between various points on the line there have been additional increases in frequency, schedules [fol. 27] between Buenos Aires and Santiago having been recently increased to a daily basis. In its pending rate case Panagra is seeking daily service over its entire route and believes such service to be abundantly justified by existing traffic conditions. Scheduled time for the trip between the Canal Zone and Buenos Aires, which was seven days when the service was first begun, is now a little over three days, flying time between terminals having been reduced recently by half a day on three of the four trips and by a full day on the fourth trip. Passenger traffic in the year 1941 will be almost twice what it was in 1940, which was in turn almost twice that of 1939. Panagra has become a great international trunk line providing international air service between Argentina, Chile, Brazil, Bolivia, Peru, Ecuador, Colombia, Panama (all of the countries of South America except the Guianas, Venezuela, Uruguay and Paraguay), the Canal Zone and thence via connecting service of Pan American to the United States. Public convenience and necessity indicate the next normal and logical step in this development to be an extension of this international route to a terminal in the United States.

6. Petitioner believes and therefore alleges that the public convenience and necessity require that Panagra's great international trunk line have a terminal in the United States and that therefore the certificate of public convenience and necessity which Panagra holds should be altered, amended and modified so as to make the northern terminal of Pan- [fol. 28] agra's route, as defined by said certificate, some point or place in the United States, such point or place being Miami or Tampa, Florida, or New Orleans, Louisiana, as the Board may determine to be most suitable in the public interest. Such a terminal would measurably facilitate and improve the service between the United States and the eight important South American countries on Panagra's route. It would improve efficiency of operations by making possible through routing of equipment and

crews. It would greatly facilitate freight handling in the coming development of that business which Panagra has under active study and which would be greatly handicapped by transshipment at the Canal Zone. It would enable Panagra to adopt schedules between the Canal Zone and the United States best adapted to the most satisfactory service on the Panagra Route without regard to service on other routes. It would facilitate preferential accommodations between the United States and the Canal Zone for traffic destined to and from points on the Panagra Route south of the Canal Zone. It would make possible basing of crews in the United States. It would forever free the Panagra service from dependence on a connecting carrier between the Canal Zone and the United States whose interests can never be expected to be exclusively service to the Panagra Route. It would give the Panagra Route the standing of an independent American international air line with a terminal in the United States such as every other comparable American foreign air service has and to [fol. 29] which Panagra's record and present position abundantly entitle it. By improving and strengthening Panagra's position in these respects, thereby enabling it to render service to the entire satisfaction of the countries on its route, Panagra will be enabled the better to perform its enlarged functions in the present emergency and to retain during the emergency and thereafter the position it now occupies over most of its route as the exclusive instrumentality chosen by the South American countries through which it operates to carry on international air service to and within those countries. All of this is manifestly in the national interest and required by public convenience and necessity.

7. Past experience has demonstrated the importance of these considerations to public convenience and necessity. Panagra's primary function in the public interest is to provide air transportation over its route for passengers, mail and express to and from the United States. With its terminal at the Canal Zone its service is always dependent on a connecting carrier between the Canal Zone and the United States. This inevitably restricts its freedom of action and places the efficiency of its operation to some extent beyond its control and in the hands of a connecting line with interests besides the single purpose of serving

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the Panagra Route. For some time prior to February, 1939, the connecting service provided by Pan American between Miami and the Canal Zone was not satisfactory and complaint about it was made to Pan American by [fol. 30] Petitioner and by Panagra. The matter was discussed from time to time with representatives of Pan American and on February 14, 1939, an agreement was entered into between Petitioner and Pan American Airways Corporation, the two stockholders of Panagra, whereby Pan American undertook to provide better connecting service between the Canal Zone and Miami. A copy of this agreement is attached hereto marked Exhibit "A." Subsequent to the execution of this agreement it was discussed with representatives of the Civil Aeronautics Board, but being an agreement between Pan American Airways Corporation and the Petitioner, and not between air carriers within the meaning of Section 412 of the Civil Aeronautics Act, it was not submitted for approval by the Board. This agreement even at the time of its execution was at best but a partial solution of the problem but it was hoped that it might meet the situation for a period at least. Following the execution of this agreement Pan American provided improved connecting service but such service has always been, and is now, subject to the difficulties and infirmities which obtain with respect to any connecting service, and in recent months has become increasingly inadequate. In recent months large numbers of persons wishing to travel between the United States and countries on the Panagra Route have been unable to do so owing to lack of accommodations on the connecting service between Miami and the Canal Zone provided by Pan American. No direct connecting service between [fol. 31] Miami and the Canal Zone has been provided by Pan American to connect with Panagra's fourth trip inaugurated August 26, 1941, and connection with that trip must be made by slower and more circuitous routes via Brownsville southbound and via Barranquilla northbound The contemplated service via New Orleans whether furnished by Pan American or by American Export Airlines, Inc. will not relieve the situation as the routes contemplated by both of these parties are not direct connecting services to the Canal Zone but services via Guatemala, designed primarily with a view to Central American Traffic. These services will be definitely slower and provide less accommodation for Panagra traffic than a direct service. The exist-

ing connecting service via Miami is generally late in arriving at the Canal Zone making it difficult and on many accasions impossible for Panagra to maintain its southbound schedules and Pan American is now contemplating a change in its connecting schedule which will greatly accentuate this difficulty. Panagra and Petitioner have complained to Pan American of the inadequacy of their direct connecting service in the respects above indicated and have demanded adequate direct connecting service but Pan American have failed to provide such service. Panagra has likewise been unable to obtain any clear assurances as to just what connecting services Pan American will provide for Panagra's additional trips when Panagra service is increased to a daily basis as above indicated. Petitioner alleges that the public convenience and necessity require that regardless of the reasons on which Pan American [fol. 32] may rely for not providing adequate connecting service, Panagra should be placed in position to meet the situation itself without being helpless, except by dependence on a connecting carrier, to give adequate service between the United States and the countries on the 8,000 mile Panagra Route.

8. During the past year in cooperation with the Governments of the several South American countries concerned and with various departments of the United States Government, in furtherance of hemisphere solidarity and defense, Panagra has replaced German airlines over its entire route between the Canal Zone and Buenos Aires. The German route mileage replaced by Panagra includes 590 miles in Ecuador, 670 miles in Peru, 4109 miles in Bolivia and 870 miles in Chile and Argentina. As a result of this development, the only airlines operating on the West Coast of South America are Panagra and bonafide local national lines. The importance of this accomplishment has been greatly increased with developments of the past few days bringing the West Coast of South America into an increasingly important strategic position. It is of the utmost importance in the public interest that Panagra's present position be maintained not only during the present emergency but after the termination thereof. Dissatisfaction in South America with the American air service which Panagra is able to render will make it easy for European airlines to regain in South America the position

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they have just lost. Panagra's position can only be main-
[fol. 33] tained by providing service between the countries on the Panagra Route and the United States of a kind which will justify the confidence which those countries have placed in the assurances given by the United States and in the air service provided by Panagra. Petitioner believes that this clearly involves putting Panagra's West Coast international air service on the same operating basis as Pan American's service to the East Coast of South America and on the same basis as all other comparable American foreign air services in respect of a terminal in the United States.

9. Subsequent to the execution of the agreement of February 14, 1939, Pan American applied to the Civil Aeronautics Board for a route between New Orleans and the Canal Zone (Docket No. 373). A similar application was filed with the Board by American Export Airlines, Inc. (Docket No. 497). Petitioner was granted leave to intervene in these proceedings. The report of the Examiner who heard these applications recommends the granting of the application of Pan American. The award of the New Orleans gateway to either Pan American or to American Export Airlines, Inc., would close to the Panagra Route for many years if not forever one of the last remaining important gateways to the United States from South America. Public convenience and necessity require that before this occurs Panagra take appropriate action to place its position as herein described before the Civil Aeronautics Board. Petitioner has been unsuccessful in its efforts to secure authorization from the Board of Panagra for
[fol. 34] Panagra to file an application for the New Orleans route, or for connecting service via Miami, in accordance with the Agreement of February 14, 1939, and is for that reason obliged to bring the matter before the Civil Aeronautics Board by its own motion. Petitioner has no desire to bring before the Board under existing war conditions any matter which might more appropriately be deferred to a later date and agrees with the policy expressed by the Board in its release of December 12, 1941. However, believing that the applicants may urge that considerations of national defense require immediate authorization of the New Orleans route, Petitioner feels required in the public interest to see that all facts regarding Panagra's position in the situation

are before the Board, before a decision is reached regarding the award of any additional connecting service between the United States and the Canal Zone. Furthermore, Petitioner believes that this petition is the only means by which the Board can be apprised of the importance of a terminal in the United States to the ability of Panagra to perform fully its obligations with respect to national and hemisphere defense.

10. Petitioner is prepared to submit to the Board full and complete evidence in support of the allegations made herein at a public hearing called for that purpose, and to show that Panagra is able to operate a connecting service to a terminal in the United States (subject, of course, to governmental regulations regarding equipment and personnel) and that authorization of such service will not [fol. 35] unduly prejudice any lines at present operating such connecting service. Prompt disposition of the matter will be greatly in the public interest as it will aid Panagra in the performance of its obligations in South America with respect to national interests and defense and will speed Panagra's preparations to assume additional important operations in the national interest which the future will impose upon it.

11. Petitioner has this day caused a notice of its intention to file the petition and complaint herein with the Civil Aeronautics Board to be served upon each of the scheduled air carriers whose names appear in the list of such carriers issued by the Civil Aeronautics Board on September 30, 1941, by mailing to each scheduled air carrier on the date hereof, by registered mail, postpaid and properly addressed, a copy of the notice attached hereto and made a part hereof as Exhibit "B".

Wherefore, Petitioner prays: (1) that in accordance with Section 401 (h) of the Civil Aeronautics Act of 1938, the Board, after due notice and hearing, and due finding that public convenience and necessity so require, alter, amend and modify the certificate of public convenience and necessity held by Panagra so as to make the northern terminal of Panagra's Route, as defined by said certificate, some point or place in the United States, such point or place being Miami or Tampa, Florida, or New Orleans, Louisiana, as the Board may deem to be most suitable in the public

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[fol. 36] interest; (2) that further action in Dockets Nos. 373 and No. 497, be stayed pending determination of this proceeding; and (3) that the Board take such further action in the premises as it may deem necessary or proper.

Respectfully submitted, W. R. Grace & Co., by A. Garni, First Vice-President.

Dated December 16, 1941.

[fol. 37] VERIFICATION

STATE OF NEW YORK,
County of New York, ss:

A. Garni, being duly sworn, deposes and says: That he is First Vice-President of W. R. Grace & Co., Petitioner herein; that he has read and is familiar with the contents of said Petition and Complaint; that he intends and desires that the Board, in acting pursuant to said Petition and Complaint, shall place complete and full reliance upon the accuracy of each and every statement contained therein; that he is familiar with the facts therein set forth and, to the best of his information and belief, every statement contained in the Petition and Complaint is true and no such statement is misleading.

A. Garni, First Vice-President.

Subscribed in my presence and sworn to before me by the affiant above-named this 16th day of December, 1941. Milton H. Bathrick, Notary Public.

(Notarial Stamp.)

[fol. 38] EXHIBIT "A"

1. One of the Grace directors of Panagra (who shall also be a director of Grace) will be elected President of Panagra and placed in responsible charge of the management of the Company. If at any time the Company's affairs are not being conducted to Pan American's reasonable satisfaction, then the President will resign.

2. Pan American will inaugurate on or before April 1, 1939, a second direct trip between Miami and Cristobal, and

will maintain an adequate direct connecting service between Miami, or some other U. S. port agreed upon, and Cristobal connecting with Panagra's through mail schedules. If at any time Pan American shall not comply with the foregoing, then Pan American will cause its directors on the Board of Panagra to take such action as will permit Panagra's applying to the C. A. A. for a Certificate to operate this connecting service, provided that, irrespective of any determination made as provided in paragraph 4, Pan American shall not be in any way precluded from maintaining before the C. A. A. that its service is satisfactory and should be continued and that no other service is required in the public interest. With the exception of the second direct trip between Miami and Cristobal above referred to, Pan American shall not be obliged to operate any schedules and service not designated by the Post Office Department as mail schedules but will use their best efforts to have designated as mail schedules any additional trips required to make connection with any increase in Panagra's through mail schedules.

3. It is agreeable to the parties that Pan American-Grace shall continue to utilize the respective services of Grace and Pan American and pay service fees in the same proportion as presently allowed, provided that the services to be rendered by the respective parties are satisfactory to Pan American-Grace.

4. Any disputes arising under this general plan and every phase thereof, including without limiting the generality of the foregoing, determination of "Pan American's reasonable satisfaction" referred to in paragraph 1 above and of "adequate direct connecting service" referred to in Paragraph 2 above, which cannot be settled by the Board of Panagra shall be determined by Messrs. D. S. Iglehart and C. V. Whitney. If Mr. Iglehart or Mr. Whitney shall be unable to act, or unable to agree in connection with any matter arising under the foregoing paragraphs, then, unless otherwise agreed between Grace and Pan American, such matters shall be determined by arbitration by an arbitrator [fol. 39] or arbitrators appointed by Messrs. Iglehart and Whitney, or failing such appointment, by three Arbitrators, one appointed by Grace, one by Pan American, and a third by those two, and the party adjudged in default shall, at the

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discretion of the Arbitrator, be given such reasonable time to correct the default as the Arbitrator may fix.

5. This agreement shall continue to February 1, 1944, and thereafter until cancelled by Pan American or Grace on six months' written notice.

Agreed—February 14, 1939.

W. R. Grace & Co., by (Sgd.) Harold J. Roig, Vice Pres. Pan American Airways Corporation, by (Sgd.) J. T. Trippe, Pres.

[fol. 40] Exhibit "B"

To Aero Pickup Service Corp., 3110 N. Boulevard, Richmond, Va.

Aerovias Nacionales Puerto Rico, Inc., 37 Recinto Sur St., P. O. Box 528, San Juan, Puerto Rico.

All American Aviation, Inc., 200 West 9th St., Wilmington, Del.

American Airlines, Inc., New York Municipal Airport, La Guardia Field, New York, New York.

American Export Airlines, Inc., 25 Broadway, New York, New York.

Automatic Air Mail, Inc., Lost Nation, Iowa.

Braniff Airways, Inc., Braniff Building, Oklahoma City, Okla.

Burke, Andrew J., 614 East Cook Street, Santa Maria, Calif.

Canadian Colonial Airways, Inc., New York Municipal Airport, New York, N. Y.

Caribbean-Atlantic Airlines, Inc., P. O. Box 3214, San Juan, Puerto Rico.

Catalina Air Transport, Catalina Airport, Avalon, Calif.

Chicago & Southern Air Lines, Inc., Municipal Airport, Memphis, Tenn.

Continental Air Lines, Inc., Municipal Airport, Denver, Colorado.

Delta Air Corporation, Selman Field, Monroe, Louisiana.

Eastern Air Lines, Inc., 10 Rockefeller Plaza, New York, New York.

Essair, Inc., Republic Bank Building, Dallas, Texas.

Hannaford Aircraft Co., 1604 Pioneer Bldg., St. Paul, Minn.

Inland Air Lines, Inc., Box 1811, Casper, Wyoming.

Inter-Island Airways, Ltd., Inter-Island Building, Honolulu, Hawaii.

[fol. 41] Kansas City Southern Transport Company, Inc., 114 West 11th St., Kansas City, Mo.

Marquette Airlines, Inc., Lambert St. Louis Municipal Airport, Robertson, Mo.

Mayflower Airlines, Inc., Nantucket, Mass.

Mercury Development Corp., 445 N. Pennsylvania St., Indianapolis, Ind.

Mid-Continent Airlines, Inc., Municipal Airport, Kansas City, Missouri.

National Airlines, Inc., Municipal Airport, Jacksonville, Florida.

New York and Bermudian Air Lines, 77 River Street, Hoboken, New Jersey.

Northeast Airlines, Inc., Boston Municipal Airport, East Boston, Mass.

Northwest Airlines, Inc., Holman Municipal Airport, St. Paul, Minnesota.

Oregon Airways, Inc., Administration Bldg., Swan Island Airport, Portland, Ore.

Pan American Airways, Inc., 135 E. 42nd St., New York, N. Y.

Pan American Airways Company (Delaware), 135 E. 42nd St., New York, N. Y.

Pan American-Grace Airways, Inc., 135 E. 42nd St., New York, N. Y.

Pennsylvania-Central Airlines, Corp., Allegheny County Municipal Airport, Pittsburgh, Pa.

Seaboard Airways, Inc., Seaboard Airline Railway Bldg., Norfolk, Va.

Southern Aviation Corp., 1000 American Trust Bldg., Nashville, Tenn.

Southwest Feeder Airlines, Inc., Sinclair Bldg., Ft. Worth, Texas.

Transcontinental & Western Air, Inc., 10 Richards Road, Kansas City, Missouri.

[fol. 42] Tri-State Aviation Corporation, Irwin, Pennsylvania.

United Air Lines Transport Corp., 5959 S. Cicero Avenue, Chicago, Ill.

Uraba, Medellin & Central Airways, Inc., 135 E. 42nd St., New York, N. Y.

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Waterman Airlines, Inc., Merchants National Bank Bldg., Mobile, Ala.

West Coast Airlines, Inc., 627 Insurance Bldg., Seattle, Washington.

Western Air Lines, Inc., P. O. Box 391, Burbank, California.

Wichita Falls Air Transport Company, The, Box 84, Wichita Falls, Texas.

Wiggins, E. W., Airways, Inc., P. O. Box 1089, Providence, R. I.

Wilson, Ray, Inc., Park Hill Airport, Denver, Colorado.

You and each of you, are hereby notified that W. R. Grace & Co., 7 Hanover Square, New York City, New York, is, this day, filing with the Civil Aeronautics Board a petition and complaint under Section 401(h) of the Civil Aeronautics Act of 1938, for the alteration, amendment and notification of the certificate of public convenience and necessity of Pan American-Grace Airways, Inc., so as to make the northern terminal of Pan American-Grace Airways' route, as defined by said certificate, some point or place in the United States, such point or place being Miami or Tampa, Florida, or New Orleans, Louisiana, as the Board may deem to be most suitable in the public interest.

W. R. Grace & Co., By A. Garni, First Vice-President.

December 16, 1941.

[fol. 43] APPENDIX B

[Docket 744]

W. R. Grace & Co., 7 Hanover Square, New York

April 27, 1942.

To the Civil Aeronautics Board, Washington, D. C.

DEAR SIRS:

Pan American-Grace Airways, Inc. has become one of the foremost air carriers in the world. Its route comprises not only one of the longest but also one of the strategic international air routes. As a result of compe-

tent and experienced management and operating organization, Pan American-Grace Airways, Inc., has attained a stature which not only justifies but requires its existence as a completely independent air carrier. At the present time its ability as an independent air carrier to fulfill its obligations to the public, and to the Governments of the United States and the eight South American countries which it serves, is being suppressed and its growth and development are being restricted by Pan American Airways Corporation, one of its own stockholders, in order that such developments may not interfere with Pan American's own interests and conflict with its own supposed monopoly of foreign air transportation.

Facts constituting the basis of this allegation are set forth in the memorandum submitted herewith. We stand ready to submit to the Civil Aeronautics Board such further information as may be required by it in making a full and complete investigation of the matters referred to herein.

We have long hesitated to place this matter before you, hoping that some other solution might be possible, but we have been reluctantly forced to the conclusion that there is no other way of remedying the existing situation. The urgent war needs, the need for better service, for economy of men and equipment, and for erasing the obstacles and impediments to these accomplishments, the need to extend and make more valuable and effective the great organization which Pan American-Grace Airways, Inc., has built up, and to give it full opportunity to render the service to the nation which it is highly competent to render and anx-[fol. 44] ious to perform:—these urgent needs, as well as the long-range interests of the line itself, make it impossible to leave unremedied the difficulties under which Pan American-Grace Airways, Inc. has so long labored.

We, therefore, respectfully request that the Civil Aeronautics Board require Pan American Airways Corporation to cease and desist from the matters and things complained of and require Pan American Airways Corporation to divest itself of its ownership of the stock in Pan American-Grace Airways, Inc. to such extent as may be necessary to divest itself of its present negative control of Pan American -Grace Airways, Inc., all in accordance with and as required by Section 411 of the Civil Aeronautics Act of 1938, and Sections 18 and 21 of the Clayton Act (Title 15,

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U. S. Code) and we further respectfully request that the Civil Aeronautics Board consider and grant the petition dated December 16, 1941 (Docket No. 707) and amend the Certificate of Public Convenience and Necessity of Pan American-Grace Airways, Inc. so as to name a point within the United States as a terminal of the route of Pan American-Grace Airways, Inc.

Respectfully submitted, W. R. Grace & Co., by D. S. Iglehart, President.

[fol. 45] BEFORE THE CIVIL AERONAUTICS BOARD, WASHINGTON, D. C.

STATEMENT OF FACTS IN SUPPORT OF LETTER OF W. R. GRACE & CO. TO THE CIVIL AERONAUTICS BOARD, DATED APRIL 27, 1942, RELATING TO PAN AMERICAN-GRACE AIRWAYS, INC.

Communications from the Board are to be sent to the following:

D. S. Iglehart, President, W. R. Grace & Co., 7 Hanover Square, New York City, New York, and Whiteford, Hart & Carmody, 815 Fifteenth Street, Northwest, Washington, D. C.

[fol. 46] STATEMENT OF FACTS IN SUPPORT OF LETTER OF W. R. GRACE & CO. TO THE CIVIL AERONAUTICS BOARD, DATED APRIL 27, 1942, RELATING TO PAN AMERICAN-GRACE AIRWAYS, INC.

1. W. R. Grace & Co., hereinafter referred to as "Grace", is a Connecticut corporation with its principal office at 7 Hanover Square, New York, New York. It has been engaged in business in Latin America, particularly the countries on the West Coast of South America and Central America, for nearly a century. With long experience in foreign transportation it saw very early the great future of international air transport. In 1928 it joined with Pan American Airways, Inc., hereinafter referred to as Pan

American*, in forming Peruvian Airways Corporation, which subsequently became Pan American-Grace Airways, Inc., hereinafter referred to as Panagra. Grace has at all times since owned 50% of the stock of Panagra, the other 50% being owned by Pan American. The Board of Directors of Panagra is composed of eight persons, four being nominated by Grace and four by Pan American. Grace and its subsidiaries have represented Panagra since its organization in all countries on the West Coast of South America and in this way its executives everywhere (already highly experienced in foreign transportation) have [fol. 47] gained a wide experience in foreign air transport problems and management. Various of the officers and directors of Grace who are also officers and directors of Panagra take a direct and active part in all matters pertaining to the management and administration of Panagra business. Harold J. Roig, a Vice President of Grace, has from the outset been especially active in Panagra's affairs and since 1939, when he became President of Panagra in responsible charge of its business, has devoted most of his time and efforts to Panagra.

2. Panagra is an air carrier within the meaning of the Civil Aeronautics Act of 1938, as amended, and at the present time holds a certificate of public convenience and necessity issued to it by the Civil Aeronautics Board, which authorized it to engage in air transportation of persons, property and mail, as follows:

> "Between the terminal point, Cristobal, Canal Zone, the intermediate points Cali, Colombia; Quito, Esmeraldas, Manta, Salinas, and Guayaquil, Ecuador; Talara, Chiclayo, Lima, and Arequipa, Peru; Arica, Antofagasta, and Santiago, Chile; Mendoza and Cordoba, Argentina, and the terminal point Buenos Aires, Argentina; and also between the intermediate point Arequipa, Peru, and the terminal point Buenos Aires,

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Argentina, via the intermediate points Arica, Chile; La Paz, Oruro, and Uyuni, Bolivia; Salta, Tucuman and Cordoba, Argentina, and also between the intermediate point Guayaquil and the terminal point Lojo via the intermediate point Cuenca, Ecuador; and also between the intermediate point Oruro, Bolivia, and the terminal point Corumba, Brazil, via the intermediate points Cochabamba, Sucre, Vallegrande, Santa Cruz, Concepcion, San Ignacio, San Jose, Robore, Pureto Suarez, Bolivia."

[fol. 48] 3. Panagra was incorporated under the laws of Delaware on February 21, 1929, for the purpose of engaging in commercial air transportation. In March, 1929, it was awarded Foreign Airmail Contract for Route No. 9 by the United States Post Office Department. It was the first American airline to operate a regular scheduled air transport service from Buenos Aires with connections to the United States. Its present route runs from the Panama Canal Zone along the West Coast of South America to Arequipa, Peru, where one branch continues along the Coast to Santiago, Chile, and thence across the Andes to Buenos Aires. The other branch proceeds across Bolivia to Oruro where it again divides into one branch proceeding across Bolivia to Corumba, Brazil, and the other through central Argentina to Buenos Aires. Commencing operations in Peru in 1929, by July of that year Panagra had extended its route to the Canal Zone on the North and to Santiago, Chile, on the South. By October of that year service had been extended over the Andes and across the Argentine to Buenos Aires. In 1935, an extension of the route from Arica, Chile, to La Paz, Bolivia, was inaugurated, thus connecting Bolivia with the international airway. In July, 1937, the route between Santiago, Chile, and Buenos Aires was diverted to include the important city of Cordoba. In April, 1937, the so-called "Diagonal Route" was instituted, being an extension from La Paz through the central portion of the Argentine to Buenos Aires via Cordoba, serving en route the important cities of Salta and Tucuman, Argentina. In July, 1938, the [fol. 49] route which had thus far been operated between Cristobal and Guayaquil over water, was diverted inland with landplane operation to serve Cali, the principal commercial city in western Columbia. In March, 1939, the route

between Cali and Guayaquil was further modified to include Quito, the capital of Ecuador. In 1940 and 1941, in connection with the elimination of German services on the West Coast of South America, Panagra has added to its route extensive local services in Ecuador, a new international service across Bolivia to the Brazilian border where it makes connection with Panair do Brazil at Corumba to provide a second South American Transcontinental service and, by management agreement with Lloyd Arreo Boliviano, has assumed management responsibility for the important local services of that company in Bolivia. As a result of all this development and expansion, Panagra is at present operating about 8,000 route miles,—more route mileage than that of any domestic airline in the United States.

4. Coincident with this expansion of its route Panagra has also, particularly during the last two or three years, greatly increased its frequencies, reduced its flying time between terminals and increased its traffic. Frequencies over the entire route have been increased from two to five round trips per week and steps are now being taken to increase this to daily service. Between various points on the line there have already been additional increases in frequency, schedules between Buenos Aires and San- [fol. 50] tiago having been recently increased to a daily basis. Scheduled time for the trip between the Canal Zone and Buenos Aires, which was seven days when the service was first begun, is now three days, flying time between terminals having been reduced recently by half a day. Passenger traffic has been increasing about 100% per year during the past several years. Thus Panagra has become a great international trunk line providing international air service between Argentina, Chile, Brazil, Bolivia, Peru, Ecuador, Columbia, Panama (all of the countries of South America except the Guianas, Venezuela, Uruguay and Paraguay), the Canal Zone and thence via connecting services of Pan American to the United States.

5. A considerable part of the expansion of Panagra's route has been accomplished at the insistence of Grace and in the face of Pan American's opposition. Soon after the organization of Panagra in 1929, it developed that Grace and Pan American entertained basically different philosophies regarding Panagra's status and destiny and

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this difference of view has continued. Grace has at all times maintained the view that Panagra, while availing itself of the facilities and experience provided by both Grace and Pan American, should be an independent entity free to operate, develop and expand as its own welfare and the public interest might dictate and that its policies, organization and operations should be conducted independently and free of any adverse domination by either of its stockholders. With this in view Grace, while placing at [fol. 51] the disposal of Panagra the services and experience of its ranking officials and of its extensive organization in South America, as well as in the United States, has always taken the position that Panagra's affairs should be administered and decisions regarding its policy, management and daily operations taken solely with reference to the best interests of Panagra and the public interest which it is Panagra's duty to serve, and without reference to opposing collateral or related interests of Grace or of Pan American or of any part of Grace's or Pan American's organizations. Pan American, on the other hand, has consistently maintained that Panagra should be administered primarily as a part of the so-called Pan American Airways System, that it should be held out to the public as a subordinate part of such system rather than as an independent entity and that its policies and affairs should be determined and administered and its destiny controlled by what Pan American might from time to time deem to be in the best interests of itself and the Pan American Airways System, and in accordance with the broad general view which Pan American has always maintained that all American international air transportation should be in the hands and control of the Pan American Airways System. In pursuance of this policy, and despite efforts of Grace and of the Panagra management to the contrary, Pan American has in its publicity, advertising, financial reports, published schedules and timetables, public interviews and comments of its officials, as well as in its official conduct in such matters [fol. 52] as those hereafter referred to, repeatedly and consistently sought to subordinate Panagra's position as an independent entity and to establish the position that Panagra is not an independent company but merely a subordinate part of the Pan American Airways System, controlled by Pan American Airways Corporation. Simi-

larly, in pursuance of this policy, Pan American, although in its own activities an outstanding example of expansion, has resisted much of the expension and development of the Panagra Route as above described. For example, Pan American opposed Panagra's overland route across Columbia via Cali. Pan American delayed approval of Panagra's extension into Bolivia to such an extent that Grace was iteslf obliged, in order to prevent its falling into the hands of a German controlled company, to acquire the concession from the Bolivian Government in its own name. Grace subsequently turned over this concession to Panagra without payment. Over a period of years and even now, when the public interest and the national defense so urgently require it, Pan American is preventing any application by Panagra for an extension of its route to any terminal in the United States.

6. The so-called "Camaguey stop" incident is illustrative of the precariousness of Panagra's position as an independent air carrier when its interests come into conflict with Pan American's. On November 25, 1941, Pan American filed an application (Docket No. 689) with the Civil Aeronautics Board for authorization to include [fol. 53] Camaguey, Cuba, as an intermediate stop on its route between Miami and the Canal Zone. The Camaguey stop while in itself desirable, would, by reason of the additional mileage and ground time, under then existing schedules have so increased the flying time between Miami and the Canal Zone as to destroy the existing connection with Panagra at the Canal Zone and greatly increase the flight time from the United States to points on the West Coast of South America, as well as to Buenos Aires. The President of Panagra, both before and after the filing of this application, directed the attention of Pan American to the adverse *affect* upon Panagra which the approval of this application would have. While these discussions were being held, Pan American, without prior notification of any kind to Panagra, filed with the Civil Aeronautics Board on December 3, 1941, a request for an Exemption Order which would have the effect of permitting the immediate inclusion of Camaguey without the notice and hearing required by the Act. Pan American in making this request omitted to notify the Civil Aeronautics Board in any way of Panagra's interest and concern in the matter and in its

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letter to the Board requesting this Exemption Order stated:

> "To the best of the applicant's information and belief, no air transportation enterprise other than applicant's Cuban subsidiary, which conducts operations to and from Camaguey, has any interest in the rendition of service to that point by the applicant."

On December 12, 1941, the President of Panagra filed, on behalf of Panagra, with the Civil Aeronautics Board a petition of intervention in Docket No. 689, so that when-
[fol. 54] ever the Camaguey proceeding was set down for hearing, or otherwise became active, Panagra's interests would be represented and protected. At that time he had no knowledge of the fact that an exemption request had already been filed by Pan American and had, in fact, already been granted by the Civil Aeronautics Board on the previous day. (Order Serial No. 1434.) Immediately the fact that the Exemption Order had been issued became known to him, he requested an opportunity to appear before the Civil Aeronautics Board in order to present the entire situation. This opportunity was granted and on December 15, 1941, the President of Panagra informed the Civil Aeronautics Board that Panagra was vitally interested in the matter, and that Panagra had had no knowledge of the exemption request. He requested that the Exemption Order be modified so as to postpone the inauguration of service to Camaguey until the stop could be made by Pan American without prejudice to Panagra's service and schedules. This request was granted by the Board and incorporated in an amended Order issued December 16, 1941. (Order Serial No. 1443.)

The President of Panagra had filed the petition of intervention with the Civil Aeronautics Board without seeking authorization from the Board of Directors of Panagra, because he had reason to believe that such authorization could not be secured as the Pan American directors on the Panagra Board would not approve it. At or before the above hearing, Pan American submitted to the Civil Aero-
[fol. 55] nautics Board a letter in which, referring to the action by the President of Panagra in intervening in the proceeding, it is stated:

> "We do not propose to question his authority to do so, although we are entirely aware of the fact he is

acting without authorization from his Board of Directors."

The object of this statement was perhaps to cast doubt upon the validity of the action taken by the President of Panagra, possibly to quash Panagra's intervention on that ground without regard to the merits. At best it is a clear warning that Panagra can only act with Pan American's acquiescence even in self defense. The statement leaves no doubt as to the position in which Panagra finds itself with regard to its connecting service between the Canal Zone and the United States. Panagra can not even protect this connecting service on which its life is so vitally dependent except by the acquiescence of Pan American which provides that connecting service. Panagra is utterly dependent on the favor of Pan American, its own hands legally tied whenever Pan American wishes to tie them, in any matter where its interests are contrary to those of Pan American.

7. Conclusively demonstrative of the situation complained of is the record of Grace's efforts to have Panagra bring its line through from the Canal Zone to a terminal in the United States. For several years Grace has felt that an extension of Panagra's Route beyond the Canal Zone to a terminal in the United States would be a normal, logical and necessary step in Panagra's development and would be in the public [fol. 56] interest. Such an extension would measurably facilitate and improve the services between the United States and the eight important South American countries on Panagra's route. It would substantially improve efficiency and economy of operations by making possible through routing of equipment and crews, thus improving utilization of equipment and reducing time lost by crews. It would enable Panagra to establish schedules between the Canal Zone and the United States best adapted to the most satisfactory service on Panagra's route without regard to service on other routes operated by a competitor. It would facilitate preferential accommodations between the United States and the Canal Zone for traffic destined to and from points on Panagra's route south of the Canal Zone. It would make possible the basing of crews in the United States. It would greatly facilitate freight handling in the coming development of that business, which

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Panagra has under active study, and which would be greatly handicapped by transshipment at the Canal Zone. It would forever free Panagra from dependence on Pan American for a connecting service between the Canal Zone and the United States. It would put Panagra's West Coast service on the same operating basis as Pan American's East Coast service. It would give Panagra's route the standing of an independent American international airline with a terminal in the United States such as every other comparable American foreign air service has and to which Panagra's record and present position abundantly entitle it.

[fol. 57] 8. Experience has demonstrated the importance of the considerations mentioned in the foregoing paragraph. Panagra's primary function is to provide air transportation for passengers, mail and express between the United States and the eight South American countries which it serves. With its northern terminal at the Canal Zone, Panagra's service is now and always has been dependent upon its 50% stockholder, Pan American, for connecting service between the Canal Zone and the United States and any inadequacy or failure of that service or any change or modification in it by way of schedule changes, service to additional intermediate points, or otherwise, has its effect upon the service which Panagra can render over its route. Problems of this character have arisen on a number of occasions. Because of Pan American's 50% ownership of Panagra, the latter cannot act in such matters except with Pan American's approval. Panagra's resulting utter dependence upon Pan American with respect to connecting service inevitably restricts Panagra's freedom of action and places the efficiency of its operation to a large extent beyond its control and in the hands of a connecting carrier possessing other interests than the single purpose of serving Panagra's route. This obviously places Panagra in a weak and definitely inferior position to Pan American with respect to this competitive service of Panagra and Pan American between the United States and Buenos Aires. At the present time, to maintain competitive schedules between the [fol. 58] United States and Buenos Aires equal to or faster than those operated by Pan American, Panagra must rely completely upon the adequacy of connections provided at the Canal Zone by Pan American and over which Panagra has no control whatsoever. Recent developments and the

requirements of national defense indicate conclusively that the continuation of Panagra's dependence upon Pan American for an outlet to the United States is not in the public interest and should be eliminated and Panagra placed in a position of complete independence with respect to the development of the international air service which it seeks to perform.

9. Grace has repeatedly urged upon Pan American and its directors on the Panagra board that because of the foregoing considerations Panagra should make application to the Civil Aeronautics Board for an extension of its route to a terminal in the United States. Pan American has consistently refused to permit Panagra to file such an application. Early in 1940, when Pan American (Docket No. 373) and American Export Airlines, Inc. (Docket No. 497) applied for the route between New Orleans and the Canal Zone, Grace again endeavored to persuade Pan American to permit Panagra to apply for this connecting route. It was apparent that the award of the New Orleans gateway to either Pan American or American Export Airlines, Inc. might foreclose Panagra from entering any important gateway from South America into the United States. Grace and the Grace directors on the Panagra Board accordingly urged upon Pan American that it should [fol. 59] not permit Panagra's service to be prejudiced by this development but that it should permit the Pan American directors on the Panagra Board to vote to authorize Panagra to apply for the New Orleans route. All of these efforts were unsuccessful. While these discussions were taking place, the applications of Pan American and American Export Airlines, Inc., above referred to, came on for hearing and in order to protect its interests and those of Panagra pending further negotiation with Pan American, Grace filed an application to intervene in said proceeding which was granted by the Civil Aeronautics Board. Further efforts to persuade Pan American to permit Panagra to apply for the route met with no success. The President of Panagra called various special meetings of the board of directors of Panagra to consider the matter and to authorize action to protect Panagra's position but the Pan American directors of Panagra, constituting one-half of the board, repeatedly failed and declined to attend such directors' meetings and adjournments thereof, thus mak-

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ing action by the Panagra board of directors impossible. Pan American itself failed to attend a stockholders' meeting of Panagra called at its request for the purpose of considering the matter, thus rendering impossible any action by the stockholders. Such action and conduct on the part of Pan American and its directors on the Panagra Board was intended and had the effect, by negative control, of preventing Panagra from taking any action whatever toward securing an extension of its services believed to be required in the public interest. Such action and con- [fol. 60] duct prevented Panagra from even submitting to the Civil Aeronautics Board for consideration the wisdom and public convenience and necessity of any such extension. Pan American considered any such extension to be competitive with its existing service between Miami and the Canal Zone and between Brownsville and the Canal Zone, as well as with its prospective service between New Orleans and the Canal Zone and accordingly exercised its 50% stock interest in Panagra in such a manner as to frustrate any possible adverse competitive result. Action by Panagra being thus rendered impossible, Grace on December 16, 1941 (Docket No. 707), itself filed an application, pursuant to Section 401(h) of the Civil Aeronautics Act of 1938, for the alteration, amendment and modification of the certificate of public convenience and necessity of Panagra, so as to name a point within the United States as a terminal of Panagra's route. Reference is made to said application for further facts bearing on this matter. Said application is still pending before the Board. Pan American has filed no answer to said petition but has not changed its previous position since the petition was filed.

10. While conditions such as those above referred to may perhaps be suffered in time of peace, they are intolerable in time of war when the national interest demands that every instrumentality of defense such as an airline in foreign service be free to function to maximum efficiency unhampered by impediments of the character [fol. 61] referred to. The situation described does not interfere with the efficient management and administration of Panagra's day to day business, but it has interfered and under existing war conditions will interfere to an increasing degree with the formulation and realization of important policies affecting the present and future welfare

of Panagra, and the public service it is able to render, whenever such policies come into conflict with Pan American's present and proposed activities or ambitions. Considerations of national defense require prompt disposition of the questions involved. The public interest and the interests of national defense demand that Panagra be a free and independent air carrier in position to maintain its relations with the public and with the United States Government as an independent entity. It should have an independent standing in the minds of the public and an independent name which will give it that standing, a name under which it can assume full responsibility for its own conduct and avoid criticism for conduct over which it has no control. Its stock ownership and the constitution of its board of directors should be such that it will be in a legal position where it can act in all matters in accordance with the public interest and its own welfare without reference to the desires, interests or aspirations of any other air carrier and where it can present to the Civil Aeronautics Board for its determination, as provided by the Act, matters involving its interests and the public interest without having [fol. 62] its hands tied by the interest of any other air carrier. The war emergency has imposed greatly added burdens and responsibilities on Panagra as an air carrier operating in eight South American countries. Panagra has, in furtherance of national defense, taken over German operations in various parts of South America, has increased its route mileage and augmented its frequencies and will undoubtedly be called upon for further expansion of this character. The present emergency is creating many rapid changes in the international air map and in the duties and responsibilities placed upon United States air carriers engaged in foreign air transportation. The complete withdrawal of American passenger steamship service between the United States and the South American countries served by Panagra, places the burden upon Panagra of maintaining vital communication between the countries on its route and between them and the United States, so essential for defense and hemispheric solidarity. The effectiveness of Panagra's service in the national defense is necessarily prejudiced by the power of Pan American through the exercise of its negative control of Panagra to tie Panagra's hands and prevent it from taking any action whatsoever, even to sub-

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mitting the matter to the Civil Aeronautics Board, which Pan American may deem adverse to its own interests. Even now, while Panagra is precluded by Pan American from proceeding in its own behalf to request authorization from the Civil Aeronautics Board to institute through service to the United States, various events are occurring [fol. 63] which constitute actual and potential inroads and threats to the territory pioneered and developed by Panagra. Other air carriers are extending, or are about to extend their operations into Mexico, Central America and the Caribbean area. What steps these carriers will take to extend their services further and into the territory served by Panagra has not as yet been fully revealed. Pan American itself, while barring Panagra from applying for any service between the Canal Zone and the United States, is rapidly expanding its own services in this area and may at any time press for early inauguration of its proposed service over the New Orleans-Canal Zone route. The present situation whereby Panagra, solely as the result of the exercise of Pan American's negative control of its actions, must stand by helpless and watch other air carriers moving into and strengthening their position in an area where Panagra should be operating to complete its own service, is prejudicial to the interests of Panagra, to the public interest and to the national defense.

Respectfully submitted, W. R. Grace & Co., by D. S. Iglehart, President.

Dated April 27, 1942.

[fol. 64] VERIFICATION

STATE OF NEW YORK,
County of New York, ss:

D. S. Iglehart, being duly sworn, deposes and says: That he is President of W. R. Grace & Co.; that he has read and is familiar with the contents of the foregoing Statement of Facts; that he intends and desires that the Board shall place complete and full reliance upon the accuracy of each and every statement contained therein; that he is familiar with the facts therein set forth and, to the best of his in-

formation and belief, every statement contained in said Statement of Facts is true and no such statement is misleading.

D. S. Iglehart, President.

(Notarial Signature and Stamp.)

[fol. 65] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19520

W. R. GRACE & Co., Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., Taca, S. A. Department of Justice of the United States of America and Pan American-Grace Airways Inc. Respondents.

APPENDIX TO
SUPPLEMENTAL BRIEF OF RESPONDENT PAN AMERICAN AIRWAYS CORPORATION

Root, Clark, Buckner & Ballantine, Attorneys for Pan American Airways Corporation, 31 Nassau Street, New York 5, N. Y.

Henry J. Friendly, James P. Kranz, Jr., John P. Apicella, of Counsel.

Dated and Filed: December 10, 1945.

[fol. 66] APPENDIX

Excerpts from Pre-Hearing Conference Reports

From Pages 2-3 of Pre-Hearing Conference Report Served December 31, 1942 (R. 199-200):

In order to assist the parties in reaching an agreement as to the contentions involved in this proceeding the

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Examiners stated that the following appeared to be the outstanding issues:

I. Does the Board have the power to order the extension of an existing certificate by amendment when no application has been filed?

II. Does the public convenience and necessity require extension of Panagra's route to the United States?

1. Public convenience and necessity
   (a) Is there need for additional service?
   (b) Who shall operate such service?
   (c) Where shall it terminate?
      1. Miami
      2. Tampa
      3. St. Petersburg

2. Public interest under section 408.

The Examiners made it clear that this proceeding would be restricted to a consideration of the issues arising under section 401 in connection with the inauguration of additional air service between the Canal Zone and Florida, and that they would not allow the introduction of testimony and exhibits that are solely related to the Board's investigation in Docket No. 744.

Public Counsel stated that in his opinion some of the factual background and history of Panagra relevant to the investigation in Docket No. 744 must be considered in this proceeding. He believes that the family difficulties [fol. 67] within the Panagra corporation are pertinent to the question of the carrier to be selected. In this connection it appears to him that the family quarrel is a factor to be considered in determining whether Panagra is fit and able to extend its present route into the United States.

Public Counsel would supplement the issues set forth by the Examiners by: (1) pointing out that willingness is a legal issue, and (2) that fitness and ability is an issue as to who should be selected to serve between the Canal Zone and the United States, either Panagra or some other carrier.

From page 1 of Supplemental Pre-Hearing Conference Report Served January 20, 1943 (R. 240):

After consideration of the exceptions and the further agreements the Examiners have determined that the pre-hearing conference report served December 31 should be supplemented in the following particulars:

1. Page 2—The second paragraph on this page is expanded to show that Public Counsel is of the opinion that some of the material relevant to the investigation in Docket No. 774 may be considered in this proceeding and is relevant for three reasons:

1. On the issue of fitness and ability of Panagra.
2. On the issue of the selection of a carrier.
3. As rebuttal to material on the question of public interest under section 408.

[fol. 68] Excerpts From Transcript of Hearings Before Examiners

S. M.* 3, line 1 to line 9, inclusive (R.* 341):

Examiner Brown: The Civil Aeronautics Board has assigned this time and place for a hearing in Docket No. 779, in the matter of alteration, amendment and modification of the certificate of public convenience and necessity of Pan American-Grace Airways, Inc., under Section 401 (h) ** of the Civil Aeronautics Act of 1938, as amended, to provide for a route terminal in the United States.

S. M. 10, Line 29, to S. M. 13, line 14, inclusive (R. 348-51):

Mr. Wiprud: May I make a brief statement for the Department of Justice at this time?

Examiner Brown: Yes.

Mr. Wiprud: I am not addressing myself to this motion, because I think the question raised in this motion is one

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* S. M. refers to the stenographic minutes of the hearings before the Examiners; R. refers to the pages of the record filed with this Court as renumbered by the Civil Aeronautics Board.

** Erroneously recorded in the stenographic minutes as 401 (b).

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that the Department is not directly concerned with. However there is a question that has bothered the Department a great deal, and which I would like to state to the Board at this time.

The Department intervened in this proceeding because of the charges of restraint and attempted monopoly in the related complaint proceeding, Docket 744. As we stated in our petition, participation by the Department of Justice [fol. 69] in these proceedings is in furtherance of the anti-monopoly policy of Congress as expressed in the Civil Aeronautics Act which this Board administrates, and the Federal anti-trust laws which the Department must enforce.

The very strong allegations of restraint and attempted monopoly set forth by both parties which have been filed with the Department as well as with the Civil Aeronautics Board require, because of the jurisdictional question raised in Docket No. 744, that the related activities of the Department of Justice as well as the Civil Aeronautics Board in this matter be coordinated.

The situation then seems to be this: Docket No. 744 involves a complaint seeking divestiture of stock ownership in Pan American-Grace Airways, and Docket No. 779 concerns authority for that company to extend its operations from the Canal Zone to continental United States. The complaint case then raised the question of ownership of Pan American-Grace Airways. Certainly if the allegations of either party or both parties are sustained, there may be a very material change in ownership. Pan American's ownership may be in all or in part divested, or both, in order to remove the alleged restraint or attempted monopoly in this field.

In this situation it seems to us that the proper finding on the issue of the fitness, ability, and willingness of Pan American-Grace Airways to conduct the proposed new operations, as well as the important public issue of restraint and monopoly may well depend upon the determination of [fol. 70] the issue of ownership. Indeed, the position of the Department in the certificate case will largely depend upon the decision made on the issue of ownership.

Furthermore, if the Board should decide that it is without jurisdiction in the complaint case, the subject matter of that case then falls within the jurisdiction of the Department of Justice under the Sherman Anti-Trust Act.

Whether the Board retains jurisdiction to determine the complaint case, or whether it concludes that it has not jurisdiction and refers the issue to the Department of Justice, the fact remains that the ownership case should precede the certificate case.

The Department, therefore, respectfully suggests that the Board first decide whether it has jurisdiction in the complaint case. If the Board decides it has no jurisdiction in the complaint case, the Department, for the reason stated, may wish to ask for a postponement of the hearing on the certificate case, or at least that it should not be closed until the issue as to ownership has been decided in some other forum.

Examiner Brown: You are not making a formal motion in that respect at this time?

Mr. Wiprud: No, Mr. Examiner. The Department merely wishes to express its views in this matter at this time. In the event that the matter becomes primarily the concern of the Department of Justice, as I stated, the Department may wish to ask that the Board continue this case, or at least not close it until the ownership question is determine-.

[fol. 71] [Cross-Examination of Harold J. Roig]

S. M. 1009, line 2 to S. M. 1011, line 22, inclusive (R. 1362-64):

By Mr. Friendly:

Q. Are you familiar with the letter of W. R. Grace & Company to the Civil Aeronautics Board dated April 27, 1942, and the document entitled "Statement of Facts" in support thereof?

Mr. Friendly: For the sake of the record, let it appear that the letter is signed by Mr. D. S. Iglehart and the statement verified by him.

Examiner Brown: And those documents are filed, are they not, in Docket 707?

Mr. Friendly: 744.

Examiner Brown: 744?

Mr. Friendly: Yes.

Examiner Brown: Of course, I don't need to remind you, Mr. Friendly, that this proceeding does not involve Docket 744.

Mr. Friendly: I know. I have only one or two questions.

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A. Yes, I have seen the letter. It refers to——

Mr. Cahill: I don't want testimony about its contents, because I intend to object to its contents.

By Mr. Friendly:

Q. Did you participate in the formulation of the Statement of Facts in any way?

Mr. Cahill: I will make my objection now on the grounds that they are immaterial and irrelevant, and not within the issues before us.

[fol. 72] Examiner Brown: I will hear you, Mr. Friendly, on that.

Mr. Friendly: I think until I have asked questions I can't argue on this in general.

Mr. Cahill: Do you want to ask just one more foundation question?

Mr. Friendly: Well, I just wanted to ask whether he participated in the formulation.

Mr. Cahill: Go ahead.

A. Yes.

By Mr. Friendly:

Q. I call your attention to the statement on page 12 of the Statement of Facts and next to the letter reads as follows: "The public interest and the interests of national defense demand that Panagra be a free and independent air carrier in position to maintain its relations with the public and with the United States Government as an independent entity. It should have an independent standing in the minds of the public and an independent name which will give it that standing, a name under which it can assume full responsibility for its own conduct and avoid criticism for conduct over which it has no control."

The Witness: Shall——

Mr. Friendly: I want to ask some questions about that statement and if Mr. Cahill likes to make his objection now, I think we can see the point.

Mr. Cahill: I want to object now on the ground that it [fol. 73] is immaterial and irrelevant, and it is an issue in Docket 744.

Mr. Reynolds: Mr. Examiner, I think Mr. Friendly is perfectly free to go into this or any other statement made outside of this proceeding by Mr. Roig or any——

Examiner Brown: This is not made by Mr. Roig.

Mr. Cahill: This is not made by Mr. Roig.

Mr. Reynolds: He testified he participated in the preparation of the letter.

Examiner Brown: Is that correct, Mr. Roig?

The Witness: That is correct.

Mr. Reynolds: And he is entitled to go into that in line with Mr. Roig's previous answer to the effect that it would be in his judgment good business to have this line as so constituted extended to the United States.

Mr. Gambrell: Furthermore, Mr. Examiner, on page 6 of the reply of W. R. Grace & Company that company makes reference to both dockets, 707 and 744 and what is set out and to Grace's intention to elaborate on it at the hearing.

Examiner Brown: Of course, you realize that those are merely pleadings in this case and this is an investigation by the Board looking into the possibility of an extension of Panagra to the United States. However, I will let Mr. Friendly proceed with the question.

Mr. Cahill may enter his exception.

[fol. 74] S. M. 1014, line 15, to S. M. 1015, line 22, inclusive, (R. 1367-68):

Mr. Friendly: I am going to ask that the letter and statement of facts be incorporated in this record. If there is any technical objection to that, I will have it prepared as an exhibit.

Mr. Cahill: I raise no technical objection. I raise the substantial objection that it is a separate proceeding, it has been so set up, and the proceedings have not been consolidated, and I take it that those are the remedies that should be employed if such cross referencing is to be had.

Mr. Friendly: I think it shows a decided inconsistency in the position of W. R. Grace & Company in spite of Mr. Roig's explanation.

Mr. Cahill: That is a matter of argument.

Mr. Friendly: It is a matter of argument, of course, but the data for the argument should be in the record.

Examiner Brown: Of course, this is a matter on file with the Board to which it may make reference, and I see no reason for incorporating it in this case. It is a public

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document, a formal document before the Board, in which a certain position has been taken and if argument is necessary, if it is desirable to argue on it, it seems to me you can argue from the other document as well as incorporating it in this record.

Mr. Friendly: It seems to me, Mr. Examiner, if this were a letter written by Mr. Iglehart to anyone——

Examiner Brown: You would have a different situation. [fol. 75] Mr. Friendly: ——we would have a right to put it in. The fact that it is written to the Civil Aeronautics Board doesn't make it any less admissible.

Examiner Brown: I am not quarreling as to the admissibility. I am merely saying that the Board can take cognizance of it just as well on its file as it can——

Mr. Friendly: If your ruling is that we may refer to it in brief and argument——

Examiner Brown: That is the ruling.

[fol. 76] ECONOMIC REGULATIONS PROMULGATED BY CIVIL AERONAUTICS BOARD

Section 285.10

Conference Procedure

In any proceeding, the examiner designated to conduct the hearing, or any other person designated by the Chief Examiner or by the Board for the purposes of this rule, may direct counsel for the parties to such proceeding to appear before him for a conference to consider the following:

(a) The formulation of the issues to be considered at the hearing by:

(1) Agreement of the parties,

(2) Amendment of the application, complaint, or petition,

(3) Any other appropriate means;

(b) The simplification of proof by:

(1) Stipulations concerning matters of which the Board can take notice, the admission in evidence of particular facts or documents, or any other appropriate matter,

(2) Limitation of the number of witnesses,

(3) The preparation of exhibits, and the use thereof in lieu of oral testimony whenever possible,

(4) Any other appropriate means;

(c) The exchange prior to the date of the hearing of exhibits proposed to be introduced therein and any other material which will expedite the conduct of the same;

(d) Such other matters as may, in the opinion of the person conducting the conference, aid in the conduct and disposition of the proceeding.

Notice of the time and place of the conference shall be given by letter or otherwise to all parties to the proceeding. [fol. 77] The person conducting the conference may require the exchange of particular exhibits in advance of the date set for the hearing, and if any exhibits are not exchanged in advance as required, or as agreed upon by counsel at the conference, the hearing shall be subject to postponement until such exchange is completed.

The person conducting the conference shall prepare a report of the same, which shall be served upon counsel for all of the parties and made of record. Counsel may object to the description of anything which occurred at the conference within five days after the receipt of the report, and such report may, in the discretion of the person preparing the same, be revised in accordance therewith. If revised, the report shall again be served upon counsel and made of record in the same manner as the original report. Exceptions may be taken on the basis of any written objection submitted within the time prescribed which has not been met by a revision of the report. Such report shall constitute the official account of all that transpired at the conference, and shall control the subsequent course of the proceeding, but it may be reconsidered and modified at any time to prevent injustice.

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 92

(Argued November 12, 1945. Decided January 28, 1946)

Docket No. 19520

W. R. GRACE & Co., Petitioner,

v.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents

Before L. Hand, Swan and Frank, Circuit Judges

Petition to Review Orders of the Civil Aeronautics Board. Remanded

Cahill, Gordon, Zachry & Reindel (John T. Cahill, Fred J. Knauer, Elmer J. Kelsey and William F. Kennedy, of counsel) for Petitioner.

[fol. 79] Wendell Berge and George C. Neal (James E. Kilday, Lawrence S. Apsey, Edward Dumbauld, John H. Wanner and Louis W. Goodkind, of counsel) for Civil Aeronautics Board.

Root, Clark, Buckner & Ballantine (Henry J. Friendly, James P. Kranz, Jr., and John P. Apicella, of counsel for Pan American Airways Corporation.

Gambrell & White (E. Smythe Gambrell, W. Glen Harlan and Harold L. Russell, of counsel) for Eastern Air Lines, Inc.

W. R. Grace (Grace) has filed a petition in this court to review orders made by the Civil Aeronautics Board entered in a Board proceeding which relates to a proposed extension of the route of Pan American-Grace Airways, Inc. (Panagra).

Panagra was organized in 1929 under Delaware law by its present owners, Grace and Pan American Airways Corporation (Pan American), each of which then purchased,

and has at all times since then owned, 50% of Panagra's outstanding stock. The agreement between Grace and Pan American which led to the organization of Panagra is confirmed in a letter from Grace to Pan American's predecessor, dated August 31, 1928, reading as follows: "This will confirm arrangement under which we will associate for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chile. A corporation will be formed under the laws of Delaware, with a capital stock of $50,000, of which $25,000 will be subscribed by yourselves and $25,000 by ourselves. This corporation will pay to [fol. 80] Huff-Daland Dusters, Inc. the sum of $15,000 for an assignment which will convey all of the rights of that company under its present Peruvian mail contract and concession. As soon as possible after the assignment has been completed, operations will be started by this company in Peru and every effort will be made to put the business there on a paying basis. We will in the meantime cooperate with you in studying the costs of operation on the route from the Panama Canal to Valparaiso and also the advisability of requesting the United States Post Office Department to advertise for a mail contract on such route and the terms of such advertisement. If you determine that it is advisable to bid on a contract for carrying the mails between the Panama Canal and Valparaiso, the Delaware corporation above referred to will be used in such service either by an increase in its capital stock to an amount sufficient to operate on the whole route or as a subsidiary operating in Peru. In either event, our subscriptions to the stock of the Delaware Company shall be credited at their full amount in the capital setup of the corporation operating the through service. We shall also have a reasonable time after a study of the estimated costs of such operation to determine what interest, if any, we will take in the company making the bid in addition to our initial investment of $25,000, such interest not to exceed, however, more than fifty percent of the total capitalization. You will have charge of the operation of the service from the Canal to Valparaiso and our houses on the West Coast of South America will be the agents of the company on a reasonable compensation basis, such agency to continue during the life of transportation contracts undertaken by the company. The details of carrying out the above must, of course, be worked out as

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we go along. We believe, however, that we have stated broadly the basis of our understanding."

[fol. 81] Shortly after its incorporation, Panagra secured a mail contract with the Postmaster General for the transportation of mail between the Canal Zone and Buenos Aires, Argentina, via various points on the west coast of South America. Operations under the contract were commenced in May 1929, between the Canal Zone and Mollendo, Peru, and were extended to Buenos Aires in October 1929. Since that date, Panagra has transported persons, property, and mail on its entire route between the Canal Zone and Buenos Aires. From time to time additional points and local services have been added to the route, so that at the present time its system comprises approximately 8,800 route miles. Its original certificate of convenience and necessity was issued by the Civil Aeronautics Board in 1938 under the "grandfather" clause, § 401 (e), of the Civil Aeronautics Act; its route has since then been extended by several amendments of its certificate.

In the opinion filed by the Board on May 24, 1944 in the present proceeding, it stated the following facts:

> "Pan American Airways, Inc., a wholly-owned subsidiary of Pan American, has operated international air transportation services since 1927. Since November 1931, it has operated an air transportation service between Miami, Florida, and Buenos Aires by way of points in the Caribbean and on the east coast of South America. In addition to that service, and others, Pan American Airways, Inc., has operated services between Miami and the Canal Zone and between Brownsville, Texas, and the Canal Zone, making connections at the Canal Zone with the services of Panagra.
>
> "The route between Miami and Buenos Aires via the Canal Zone and Panagra's west coast route is shorter than the route of Pan American Airways, Inc., between Miami and Buenos Aires via east coast points and the [fol. 82] so-called Brazilian cut-off. At no time has Panagra operated regular air transportation service north of the Canal Zone. Although traffic between the United States and points on the west coast of South America and Buenos Aires constitutes a large and important part of Panagra's total business, this traffic has been carried between the United States and the Canal Zone by other carriers, largely by Pan American

Airways, Inc., and at that point delivered to or received from Panagra for onward transportation. Most of the business interchanged by Pan American and Panagra at the Canal Zone is carried over Pan American's Miami-Canal Zone route, and originated in or is destined to the eastern seaboard of the United States. Other important contributions to Panagra's traffic flow are made to or from the Canal Zone through the Brownsville gateway served by Pan American's subsidiary, Compania Mexicana, S. A. Some traffic originating on or destined for the north coast of South America is also interchanged with Panagra at the Canal Zone. In addition, Pan American Airways, Inc., has recently been authorized to serve New Orleans, and New Orleans-Canal Zone service via Central America will enable traffic to be interchanged with Panagra at the Canal Zone * * * Since its incorporation * * * Panagra's commercial operations at all times have been confined to the transportation of passengers, cargo, and mail between the Canal Zone and points in South America. While a large proportion of its total traffic has consisted of traffic flowing between the United States and South America, that traffic has been moved north of the Canal Zone by other carriers."

For many years Grace has sought to have Panagra apply to the Board for an extension of its route from the Canal [fol. 83] Zone to the United States; but Pan American, through its 50% voting power, has consistently prevented Panagra from making an application for such an extension. Pan American asserted that the letter-agreement of August 31, 1928, did not contemplate such a development. The minutes of a meeting of Pan American's board of directors held December 28, 1938, contain the following: "It was the sense of the meeting that it would not be in the interest of our stockholders for our directors to authorize an application by Pan American-Grace Airways, Inc., to extend north of Cristobal in competition with Pan American Airways, Inc."

On February 14, 1939, Grace and Pan American made the following agreement:

"1. One of the Grace directors of Panagra (who shall also be a director of Grace) will be elected Presi-

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dent of Panagra and placed in responsible charge of the management of the company. If at any time the Company's affairs are not being conducted to Pan American's reasonable satisfaction, then the President will resign. 2. Pan American will inaugurate on or before April 1, 1939, a second direct trip between Miami and Cristobal, and will maintain an adequate direct connecting service between Miami, or some other United States port agreed upon, and Cristobal, connecting with Panagra's through mail schedules. If at any time Pan American shall not comply with the foregoing, then Pan American will cause its directors on the Board of Panagra to take such action as will permit Panagra's applying to the C. A. A. for a certificate to operate this connecting service, provided that, irrespective of any determination made as provided in paragraph 4, Pan American shall not be in any way precluded from maintaining before the C. A. A. that its service is satisfac-
[fol. 84] tory and should be continued and that no other service is required in the public interest. With the exception of the second direct trip between Miami and Cristobal above refered to, Pan American shall not be obligated to operate any schedules and services not designated by the Post Office Department as mail schedules but will use their best efforts to have designated as mail schedules any additional trips required to make connection with any increase in Panagra's through mail schedules. 3. It is agreeable to the parties that Pan American-Grace shall continue to utilize the respective services of Grace and Pan American and pay service fees in the same proportion as presently allowed, provided that the services to be rendered by the respective parties are satisfactory to Pan American-Grace. 4. Any disputes arising under this general plan and every phase thereof including, without limiting the generality of the foregoing, determination of 'Pan American's reasonable satisfaction' referred to in paragraph 1 above and of 'adequate direct connecting service' referred to in paragraph 2 above, which cannot be settled by the Board of Panagra, shall be determined by Messrs. D. S. Iglehart and C. V. Whitney. If Mr. Iglehart or Mr. Whitney shall be unable to act, or unable to agree in connection with any matter arising under the foregoing paragraphs, then, unless

otherwise agreed between Grace and Pan American, such matter shall be determined by arbitration by an arbitrator or arbitrators appointed by Messrs. Iglehart and Whitney, or failing such appointment, by three arbitrators, one appointed by Grace, one by Pan American, and a third by these two, and the party adjudged [fol. 85] in default shall, at the discretion of the Arbitrator, be given reasonable time to correct the default as the Arbitrator may fix. 5. This agreement shall continue to February 1, 1944, and thereafter until cancelled by Pan American or Grace on six months' written notice."

A meeting of Pan American's directors held January 7, 1941, adopted the following resolution: "Resolved, that the Corporation, as owner of half of the stock of Pan American-Grace Airways, Inc., should decline to acquiesce in the filing by Pan American-Grace Airways, Inc., of an application for a certificate of convenience and necessity between the Canal Zone and New Orleans, Louisiana, and that the representatives of the Corporation upon the Board of Directors of Pan American-Grace Airways, Inc., should not attend the meeting of such Board of Directors called for the afternoon of January 14, 1941, to act upon such proposal, or any adjournment thereof, and, except upon further instructions from the Executive Committee or the Board of Directors, should not attend any other meeting of the Board of Directors of Pan American-Grace Airways, Inc., at which action is to be taken upon the subject matter above-described." At a meeting of Pan American's directors held on July 1, 1941, this action was reaffirmed on the ground that it "would not be in the interest of" Pan American or Panagra "or in the public interest."

The Civil Aeronautics Board, in its opinion of May 24, 1944 in the present proceedings (known as Board's Docket No. 779) said:

"On December 16, 1941, Grace filed a petition and complaint, Docket No. 707, requesting the Board to institute a proceeding pursuant to section 401 (h) of [fol. 86] the Act to alter, amend, and modify Panagra's certificate of public convenience and necessity so as to make the northern terminal of its route a point in the United States such as Miami or Tampa, Florida, or

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New Orleans, Louisiana. On April 29, 1942, Grace filed a second complaint, Docket No. 744, requesting the Board to require Pan American Airways Corporation pursuant to section 411 of the Act and sections 7 and 11 of the Clayton Act, to cease and desist from certain matters alleged by Grace to be in violation of those sections, and to divest itself of its ownership of the stock of Panagra to the extent necessary to divest itself of its present negative control of Panagra; and also renewing its request in Docket No. 707. No formal steps were taken by the Board in connection with the Grace petitions in Dockets Nos. 707 and 744 until September 1942 • • • However, the Board did explore the possibility of working out a voluntary settlement of the controversy between Pan American and Grace. Numerous conferences were held by the Board with both parties. Finally, the Board suggested that the parties enter into an agreement under which sufficient shares of the two stockholders would be transferred to an independent public voting trustee or trustees to permit the election to the Panagra Board of an independent public director or directors, or under which such an independent public director or directors might be otherwise appointed, who would be able to break the deadlock resulting from the equal division of the ownership of Panagra stock between Pan American and Grace. After it became apparent that no satisfactory voluntary arrangements could be mutually agreed upon by the parties and that all efforts to mediate the differences between them would be unsuccessful, the Board, on September 10, 1942, issued its order [fol. 87] • • • as amended by its order of October 22, 1942 • • • instituting the present proceeding • • •"[1]

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[1] The Board's effort to work out "a voluntary settlement of the controversy between Pan American and Grace" apparently continued even after these orders for hearing issued. For on October 28, 1942, Grace wrote the Board as follows: "We accept your suggestion in principle and, for the duration of the war, we agree to the immediate addition to Panagra's Board of an odd director (satisfactory to both stockholders) who might also serve as Chairman of the Board, with the understanding that this individual will be

Grace's petition, filed April 29, 1942 (Docket No. 744) consisted of a letter to the Board with an accompanying "Statement of Facts." The Board's Regulations provided: "Complaints may be made to the Board informally by letter * * *"

The order of September 10, 1942, entitled Docket 779, read as follows:

> "It appearing to the Board:
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> "1. That W. R. Grace & Co. (hereinafter called "Grace") and Pan American Airways Corporation each own 50 per cent of the stock of Pan American-[fol. 88] Grace Airways, Inc. (hereinafter called "Panagra"); and
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> "2. That Grace has filed with the Board a petition (Docket No. 707) for the alteration, amendment and modification of the certificate of public convenience and necessity of Panagra pursuant to section 401(h) of the Civil Aeronautics Act of 1938, as amended, so as to name a point within the United States as a terminal of Panagra's route; and
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> "3. That Grace alleges in said petition that Panagra's primary function is to provide air transporta-

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free to decide independently and without limitation, and on the basis of Panagra's being an independent entity, all matters involving Panagra's operations without regard to which the Pan American and Grace directors may be unable to agree. Such an arrangement accomplishes the same purpose as establishing a voting trust along the lines you suggested, while being less complicated and more easily put into effect. For reasons pointed out this morning, the suggestion of Pan American that there be an odd director appointed, who would only have 'power to break any deadlock on any questions arising in connection with operations of the company that fall within the scope of the dedication of capital made by the two stockholders' begs the entire question. Grace and Pan American are not in agreement as to what is the proper scope of the company's operations, and fourteen years' experience has shown that such deadlocks as arise almost invariably revolve around this very issue which Pan American wishes to exclude from the jurisdiction of the odd director."

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tion over its route for passengers, property, and mail between the United States and the west coast of South America; that at the present time Panagra is dependent on Pan American Airways, Inc. (hereinafter called "Pan American"), a wholly owned subsidiary of Pan American Airways Corporation, for connecting service between the United States and the Canal Zone; and that such connecting service has been unsatisfactory for the reason alleged in said petition; and

"4. That unsatisfactory connecting service, if such exists, may result in air transportation service to the public between the United States and the west coast of South America which is inadequate and deficient as to both quality and quantity, and may also result in retarding the proper and sound development of air transportation service between the United States and the west coast of South America; and that such results would not be in the public convenience or necessity or in the public interest as defined in section 2 of said Civil Aeronautics Act of 1938 as amended; and

[fol. 89] "5. That Pan American is the only air carrier authorized at the present time to engage in air transportation between the United States and South America, and that an additional service by another air carrier may provide competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; and

"6. That Grace in its petition, Docket No. 744, alleges that Panagra, because of the opposition of its 50 per cent stockholder, Pan American Airways Corporation, is not authorized by its Board of Directors and stockholders to make application to this Board for the amendment of its certificate of convenience and necessity so as to provide for said terminal in the United States; and

"The Board finding that its action herein is necessary in order to carry out the provisions of, and to exercise and perform its duties under the Civil Aero-

nautics Act of 1938, as amended, and acting upon its own initiative and pursuant to the powers and duties vested in it under Titles II, IV and X of the Civil Aeronautics Act of 1938, as amended, particularly section 401(h) thereof;

"It Is Ordered:

"1. That a proceeding is hereby instituted by the Board to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, [fol. 90] amended and modified to authorize and require (a) that Panagra's route terminate in the United States at Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California; or at two or more of said points; and (b) in the event a terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States; and

"2. That Panagra, Grace and Pan American are made parties to this proceeding; and

"3. That this proceeding be assigned for public hearing before an examiner of the Board at a time and place hereafter to be designated."

The amending order of October 22, 1942, provided in part that "paragraph 1(a) of the aforesaid order of the Board dated September 10, 1942 (Order Serial No. 1928) be and it is amended by striking out the words 'Miami or Tampa, Florida; New Orleans, Louisiana; Brownsville or El Paso, Texas; Los Angeles, California,' and inserting in lieu thereof the words 'Miami, Tampa or St. Petersburg, Florida * * *'."

Pan American filed a petition to intervene, which the Board granted. Pan American then filed an answer in which it stated that it was an answer to the petitions filed by Grace in Dockets Nos. 707 and 744. Pan American in this answer asked that the Board consider whether Grace, because of its interest in Panagra, was violating § 408.

Eastern Air Lines, Inc., was permitted to intervene. It asked the Board to consolidate the hearing with Eastern's [fol. 91] application (Docket No. 782) for a certificate to engage in transportation between the Canal Zone and divers

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points in the United States. Similar motions for consolidation were made by three other carriers. In its amending order of October 22, 1942, the Board said: "That all requests and motions for consolidation of other applications and dockets with this proceeding are hereby denied."

In pre-hearing conferences, Pan American asked that Grace be required to furnish exhibits bearing on its alleged violation of § 408. In a supporting memorandum, Pan American referred to "Grace's complaints in Dockets No. 707 and 744 which form the background of this proceeding * * *" In reply, Grace contended that the Board should not go into the question of Grace's violation of § 408 because the "scope of Docket No. 779 does not include the issues raised by Grace in Docket No. 744 with respect to Section 411 * * * If the Board wishes to pursue this subject [questions of corporate control and management] further, it should grant the petition of Pan American for an investigation under Section 415 of the Civil Aeronautics Act, just as it should institute proceedings under Section 411 as requested by Grace in Docket No. 744 if it wishes to pursue all the questions raised by Grace in Docket No. 744. These, we submit, should, in any event, be separate proceedings from the instant one, so as not to delay or obstruct the prompt disposition of this proceeding. Grace does not believe that the Board should go into those issues here or the extensive and complicated issues as to the applicability of Section 408 when it is abundantly apparent that neither Section 408, 411 or 415 is relevant to the instant proceeding." The Examiners ruled that the information requested by Pan American and Grace be furnished.

[fol. 92] The Department of Justice, which was permitted to intervene, urged, early in the hearing, that the issues under the "complaint" as to monopoly should be resolved before the Board heard evidence as to amendment of Panagra's certificate,[18] but the Examiners did not adopt that suggestion.

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[18] It also urged that the issue of Panagra's fitness, ability and willingness to conduct the proposed new operations was intertwined with, and could not be decided without consideration of, the issue arising from the dual ownership of Panagra.

In the Report of the Prehearing Conference, dated December 31, 1942, the Examiners said, "The Examiners make it clear that this proceeding would be restricted to a consideration of the issues arising under §401 in connection with the inauguration of additional Air service between the Canal Zone and Florida, and that they would not allow the introduction of testimony and exhibits that are *solely* [1b] related to the Board's investigation in Docket No. 744." The Examiners apparently agreed with a statement of the Board's Public Counsel that some of the factual background relevant to the investigation in Docket No. 744 should be considered in the Docket No. 779 proceeding, that "the family difficulties within • • • Panagra are pertinent to the question of the carrier to be selected; • • • [to the question] whether Panagra is fit and able to extend its present route into the United States."

At the hearing, counsel for Pan American offered in evidence Grace's petition filed April 29, 1942 (Docket No. 744). Grace objected, and one of the Examiners, after noting that the proceeding did "not include Docket No. 744," said, "Of course, this is a matter on file with the Board to which it may make reference, and I see no reason for incorporating it in this case. It is a public document, [fol. 93] a formal document before the Board, in which a certain position has been taken and if argument is necessary and if it is desirable to argue on it, it seems to me you can argue from the other document as well as incorporating it in this record • • • I am not quarreling as to the admissibility. I am merely saying that the Board can take cognizance of it just as well on its file as it can • • •" Counsel for Pan American interrupted to say, "If your ruling is that we can refer to it in brief and argument—," to which the Examiner replied, "That is the ruling."

During the hearing, when counsel for Grace objected to a certain line of inquiry, the Examiner said:

> "Examiner Brown: Mr. Cahill, we have got to make it clear that we have got a very wide investigation. In the exhibits that have been submitted not only by Pan American but also by Grace and by Panagra, we have gone into details concerning the organization and development of this company back from the days of its early inception. We have gone into matters of

[1b] Emphasis added.

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the minutest detail, concerning the operations and the conflict of interests which have arisen, and we have gotten into questions concerning control under Section 408 of the Act, and while I agree that this investigation was for the purpose of determining whether or not Panagra should be extended from the Canal Zone to the United States, those issues are in here and we might just as well face it, and that is what we are going to have to hear." And the Board's counsel remarked: "* * * we are getting so far away from our convenience and necessity * * * that we don't even recognize [a question of convenience and necessity] when we see it."

[fol. 94] At any rate, before the hearing was ended, many pages of evidence relevant to the issues raised in Grace's petitions were received in addition to material relevant to Pan American's countercharges.[1c]

[1c] Thus evidence was received bearing on Grace's efforts for, and Pan American's against, the extension of Panagra, up to the time of the hearing; of the alleged failure of the Pan American directors of Panagra to cooperate with efforts of the Grace directors to extend Panagra's route, and the alleged attempts by Pan American to exact payment from Panagra before giving consent to proposed extensions. The record also contains testimony in regard to the opposition of Pan American to the extension of Panagra into areas where it would compete with Pan American subsidiaries and with Scadta, in which Pan American had a substantial interest. The differences between Grace and Pan American directors as to types of equipment, radio facilities and publicity techniques were all aired at the hearing, as were Grace's charges that Pan American had used unfair competitive practices in its failure to furnish adequate connecting service to Panagra. There is also evidence in regard to Pan American's alleged efforts to divert Post Office patronage from Panagra to Pan American. In addition there is evidence bearing on Pan American's charges that Grace's interest in the Grace Line, and representation of Panagra in South America by the agencies of Grace, were detrimental to Panagra.

This summation is not exhaustive, but merely illustrative of the material which appears in the record in Docket No. 779.

At the beginning of the hearing, Pan American had moved to dismiss the proceeding for want of jurisdiction in the Board. The Board denied this motion without prejudice to its renewal at the close of the hearing. When the hearing before the Board's Examiners closed, Pan American renewed its motion, asking that it be set down for argument before the Board heard argument on the merits. The Board granted this request. Grace then filed a countermotion asking deferment of argument on the jurisdictional issue until final argument on the merits. The Board entered an order, dated December 17, 1943, denying the crossmotion. After hearing argument on the motion to dismiss, the Board on May 24, 1944, entered an order, accompanied by an opinion, dismissing the proceeding for want of jurisdiction.

[fol. 95] In its opinion of May 24, 1944, the Board said, *inter alia*:

> "Since its incorporation in 1929 Panagra's commercial operations at all times have been confined to the transportation of passengers, cargo, and mail between the Canal Zone and points in South America. While a large proportion of its total traffic has consisted of traffic flowing between the United States and South America, that traffic has been moved north of the Canal Zone by other carriers. The extension of Panagra's system referred to in the order instituting the present proceeding would give the carrier direct access to one or more of the major gateways for through traffic between the United States and Latin America. The extension would permit it to connect directly with the domestic air transportation system of the United States, without the necessity of relying upon the connecting services of Pan American and other carriers operating in the foreign field for access to traffic flowing to and from the continental United States. The extension would increase the route mileage of Panagra approximately 1200 miles, or about 14 per cent of its existing mileage. It is estimated that the extension initially would require an additional capital investment on the part of Panagra of around $800,000 which compares with Panagra's gross assets at the end of 1942 of $10,700,000 and its net worth, exclusive of goodwill, of over $3,000,000.

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"In the light of the conditions surrounding the extension here involved we conclude that the requiring of the extension would not be within the power granted the Board by section 401(h) to 'alter, amend, [or] modify' Panagra's certificate. The length of the mile-[fol. 96] age of the new service and the amount of additional investment required to operate it have been factors in reaching this conclusion. However, the principal consideration which influences us is the fact that to extend the Panagra system from the Canal Zone to a point in Florida would constitute a basic transformation of the character of the carrier. Panagra, now a connecting carrier as to through traffic between the United States and South America, would be made a carrier directly serving that traffic—and serving it moreover in competition with an affiliated company. There is a fundamental difference between the position of a carrier whose routes stop so far short of the continental United States as those of Panagra and which depends upon connecting carriers for access to traffic to and from that area, and a carrier which has direct access to the continental United States over its own system. It does not seem reasonable to believe that Congress contemplated that such a change in the character of a carrier's system should be compelled by Government order. We find, therefore, that the extension of Panagra's route from the Canal Zone to the United States would not be an alteration, amendment, or modification of its certificate within the meaning of section 401(h) of the Act in the sense that the Board could compel such an extension in the absence of an application from Panagra.

"Regardless of which of the co-owners of Panagra is at fault, the very fact that controversy of this kind has developed indicates that an unhealthy condition exists in the internal affairs of the company. A decision by the Board, after consideration on the merits, of the question of whether or not Panagra's routes should be extended to some point or points [fol. 97] in the continental limits of the United States would remedy one particular controversy between the co-owners; but it would not solve the basic difficulties

> of the Panagra joint ownership. This is an inherently bad situation. Deadlock between the two interests equally represented in the ownership of the company is always possible, and certain to occur from time to time, especially in view of the special interests and the other activities of the two co-owners. We have sought remedy under the Civil Aeronautics Act, but after having the facts presented in extensive public hearings, we must conclude that the Act does not give the Board the power to take the action contemplated by this proceeding."

By an order of August 5, 1944, the Board denied Grace's petition for reargument and reconsideration in which Grace (without referring to Section 411) had requested the Board to vacate its dismissal order and remand the case to the Examiners for a report on the facts relating to the issue of jurisdiction and to the merits. Grace then petitioned this Court to review the orders of December 17, 1943, of May 24, 1944, and of August 5, 1944. Pan American, and Eastern Air Lines, Inc., moved to dismiss that petition. In its brief filed in this court in support of its motion to dismiss, Pan American said that "the proceeding in Docket 779 * * * was instituted not only under Section 401(h), but also under Titles II and X of the Act, which supply the Board with investigatory authority (Sections 205(a) and 1002(b))." Eastern also, in its briefs in this court, referred to the action of the Board as in part under §1002(b).

In its petition to review the Board's order, Grace alleged, *inter alia*: "The Board erred in taking into consideration as bearing on its jurisdiction under §401(h) of the Civil Aeronautics Act, any controversy between the co-owners [fol. 98] of Panagra." The petition did not refer to the Board's failure to take action under §411, but it concluded with a prayer "that petitioner have such and other further relief as to the Court may seem just and proper in the premises."

Sections of the Act cited on this appeal read as follows:

Section 2. (Declaration of Policy) In the exercise of its powers and duties * * * the Board shall consider the following among other things, as being in the public

interest, and in accord with public convenience and necessity—(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; * * * (c) The promotion of adequate, economical, and efficient service by carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense * * *.

Section 411. The Board may, upon its own initiative or upon complaint by any air carrier or foreign air-carrier, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier or foreign air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation. If the Board shall find, after notice and hearing, that such air carrier or foreign air carrier is engaged in such unfair competition, it shall order such air carrier or foreign air carrier to cease and desist f-om such practices or methods of competition.

[fol. 99] Section 1002(a). Any person may file with the Board a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Board to investigate the matters complained of. Whenever the Board is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing * * * (c) If the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this chapter or any requirement established pursuant

thereto, the Board shall issue an appropriate order to compel such person to comply therewith.

Section 401. (Certificate of public convenience and necessity) * * * (d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied. (2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the [fol. 100] provisions of this chapter and the rules, regulations, and requirements of the Board hereunder * * * (h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require or may revoke any such certificate, in whole or in part, for intential failure to comply with any provision of this subchapter or any order, rule or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder therof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

FRANK, *Circuit Judge:*

1. It has been suggested that the Board should have considered and decided the issue of the violation of Section 411 by treating the proceeding as it involved Grace's

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petition No. 744.[2] But the scope of this proceeding (No. 779) is to be measured, we think, by the directory part of the Board's order of September 10, 1942; not by its recitals, save as these may be necessary to throw light upon the rest; nor by what the parties said in their argu- [fol. 101] ments and briefs, or in the course of the hearings. Of course, we do not mean that the order finally fixed the issues; but we think it did so in the absence of some amendment plainly intended to change them. Turning then to the order, the proceeding was "to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered." The proceeding was therefore under §401(h); and such we think it remained throughout, for the recital about No. 744 served no further purpose than to allege that the Pan American Company was preventing Panagra from itself making the application. It would be too much to say that the Board treated the proceeding as a continuation of No. 707. But it came nearly to the same thing after Grace & Company had been cited in, and Pan American had been made a party by intervention, for No. 707 had also been addressed to the same issue of "public convenience and necessity." The Board never carried through this purpose: eventually it felt itself foreclosed, because it did not treat Panagra as an applicant for the extension, and that limited the inquiry to whether the facts justified forcing such an extension upon an unwilling carrier. Once the Board had decided that they did not, it became impossible to go on with the original issue of public convenience and necessity; and the proceeding necessarily came to an abortive end. We will assume for argument that the Board was right in its holdings, if Panagra was to be regarded as an unwilling carrier, and if therefore the only issue was whether the proposed extension could be forced upon it. That was indeed an issue with which the Board was peculiarly qualified to deal, and the new competition which the extension would invite—to say nothing of its expense—may well have put the extension out- [fol. 102] side those additional burdens which a licensee impliedly accepts as part of the control to which his rights

[2] In an appendix to this opinion we have stated, in some detail, the contentions in support of that position.

are in any event subject. Unless therefore it was within the power of the Board to inquire into the right of Grace & Company to speak for Panagra, and by doing so to make the application a voluntary one, it may well be that the order was right. If on the other hand the Board had power to make that inquiry, it could have pressed the proceeding to a conclusion along the lines on which it had been initiated, and we think that this is what it should have done.

In *Pittsburgh etc. R. R. Co.* v. *United States,* 281 U. S. 479, the Supreme Court held that, in reviewing an order of the Interstate Commerce Commission, the court might not examine whether the majority shareholders of a railroad, a party to the proceeding, were abusing their power in taking the position in the proceeding which they did. Such an inquiry was to be reserved for a separate suit, and could not be interjected into the controversy before the Commission. In spite of some differences which we will point out, we might feel that decision conclusive here, were it not for the decision in *American Power & Light Co.* v. *Securities & Exchange Commission,* 325 U. S. 385; particularly that part of it which dealt with Okin's appeal. Okin, the court said, had no interest in the proceeding before the Commission different from any other shareholder's; he could speak only for his class and his claim was therefore necessarily derivative. Since he was allowed to appeal, we can see no escape from concluding that he had a standing to assert a right of the Electric Bond & Share Company.[3] If he had not, he had no standing at all

[3] The Supreme Court, after what appear to be conflicting decisions as to whether a person with sufficient interest to become a party to a proceeding before an administrative agency has enough of an interest to maintain court review of that agency's order entered in that proceeding, recently stated that the question is now open and undecided. See *Alton R. Co.* v. *United States,* 315 U. S. 15, 19; *Chicago Junction Case,* 264 U. S. 258, 267; *Sprunt* v. *United States,* 281 U. S. 249, 255; *Pittsburgh & W. Va. Ry. Co.* v. *United States,* 281 U. S. 479, 486-488; cf. *Associated Industries* v. *Ickes,* 134 F. (2d) 694, 711-712 and note 57 (CCA 2).

In other words, the interest necessary to maintain court review has been regarded as at least as great as, if not

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[fol. 103] —unlike the American Power & Light Company, which had an individual grievance. His power so to speak for the company depended upon his allegation that the action of the directors was actuated by "illegality and fraud" (p. 392) which made futile any recourse to the management. In accord with this, it seems to us that, if Grace & Company could prove that the opposition of Pan American (the parent company, for we disregard the subsidiary) to Panagra's applying for an extension was due to "illegality and fraud," it would follow that this proceeding should be regarded as a voluntary application for the extension; and then it would be open to the Board to decide the issue of public convenience and necessity.[4] Certainly there is everything to be said in favor of such a course, if it is possible. To await the outcome of a suit brought in a court to direct Panagra to apply for the extension, would be at best dilatory and vexatious, and there are other and more important reasons against it.

The issues, upon which such a shareholder's suit would depend, would be whether the Pan American Company was opposing the extension because it was pursuing its [fol. 104] own advantage to the prejudice of the joint interest ("fraud"), and because it was engaging in some unfair trade practice ("illegality"). Both those issues demand the same specialized acquaintance with commercial aviation and its ramifications as a decision upon the public convenience and necessity of the extension itself. No court, state or federal, would have that acquaintance; by hypothesis the Board does have it, and the Board alone. To remove the decision from the Board, not only duplicates the time and labor, but subjects the result to the final determination of a relatively incompetent tribunal; for,

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greater than, that necessary to participate in proceedings before the agency. Consequently, one who, like Okin (and therefore like Grace), has the status to initiate judicial review would seem clearly to be entitled to initiate an administrative proceeding.

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[4] The Board tells us that in other cases it has treated consents by carriers, filed in s. 401(h) proceedings, as voluntary petitions for extensions under § 401 (d). We think that a correct conclusion.

if the court should decide that the Pan American Company's refusal was neither oppressive, nor unlawful, there would be an end of this proceeding, and of No. 707. It might, however, still be possible for the Board under § 411 to order the Pan American Company to "cease and desist" from any unfair trade practices in which the Board—differing from the Court—might think it engaged; but surely such a conflict between court and Board would be to the last degree undesirable, regardless of the possible insufficiency of the available remedies. For these reasons it seems to us that in this proceeding the Board had power to determine, as between Grace & Company and the Pan American Company, which should speak for Panagra. Needless to say, we suggest nothing as to the proper outcome of that inquiry.

There remains only the question whether the Board would be justified in refusing to introduce that controversy into this proceeding, and in reserving it for either No. 707 or No. 744. In the first place it does not appear that, if the Board had believed the power to exist, it would have refused to press the proceeding to a conclusion; but; even if it would have refused, we should not concur. True, the Board must have very wide latitude in deciding in [fol. 105] what order to take up the issues in any litigation (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134); but *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. ——, decided that there may be practical reasons for not determining part of an indivisible controversy in advance, even though the first decision will not be conclusive. In the case at bar more than four thousand pages of evidence had been taken and the record was complete, before the Board finally decided the motion which had been pending from the outset. It may prove possible in a separate hearing later to be called in No. 707 to introduce the evidence so taken; but we can see no conceivable reason, except a defect of power, for adopting so futile and dilatory a course.[5] *Arguendo*,

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[5] More than four years have elapsed since Grace, on December 16, 1941, filed its petition (No. 707) but the Board has not yet acted thereon. It is not impossible that should the Board much longer delay, and then decide that the extension should be granted to Panagra, its action might be

one might even agree that it might have been convenient *in limine* to decide whether the extension could be forced upon Panagra *in invitum*, reserving the trial of any other issues. But to frustrate the whole undertaking when it lay ripe for final conclusion was, we think, beyond even that generous latitude which must be accorded to the Board's [fol. 106] discretion. Hence we conclude that the Board should be directed to decide whether Panagra should be treated as applying for the extension; and if that turns out to be true, whether the public convenience and neces-

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frustrated by the intervening grants of licenses to other carriers.

Indeed, in the briefs of the parties we are told the following facts which do not appear of record: Since the date when the Board dismissed the present proceedings, other carriers have applied for certificates covering routes between the Canal Zone and the United States, and the Board has held a consolidated hearing on such applications known as the Latin American Proceeding (Docket No. 525 *et al.*). In that consolidated hearing, the Board's Examiners and its Public Counsel have reported that, while the public interest would best be served by the extension of Panagra to a United States terminal, they considered that recommendation foreclosed by the Board's decision in the proceedings now before us, and consequently they recommended that routes between the United States and the Canal Zone be awarded to other carriers.

The Public Counsel, in his brief before the Examiners in Docket No. 525, said: "Probably Panagra carries this traffic as far on its own system as the distance between Balboa and New York or Miami. This fact, in addition to the fact that Panagra has carried this traffic for a number of years, would seem to entitle Panagra to a certificate for this route. Such an authorization would also provide the greatest public convenience. However, as is well known, the Panagra directors representing Pan American have refused to approve an application for such an extentsion. Thus, Pan American, through its 50 percent ownership, has prevented the countries on the west coast of South American from realizing the convenience of a one-carrier service from a United States carrier. Since we are prevented by this action of Pan American from recommending the best possible service, we must turn to the next best solution."

sity require the extension to be granted. These two issues being intricately intermeshed, as we have said, we do not mean that they should be decided *seriatim*. Logically, indeed, they do arise in the order we mention, but the very purpose of joining them would be in part defeated if both were not decided together.

Whether the agreements of August 31, 1928 and February 14, 1939, violated the anti-trust laws will not affect the issues. For, even if those agreements were legal, it does not follow that Pan American is not using its voting power in Panagra illegally. And even if the agreements, when made, were in violation of the anti-trust laws, Grace would not be thereby estopped from asking to be relieved of them; a party to a contract violative of a statute cannot be estopped from repudiating it when such repudiation will further the very public interest which the statute was designed to protect.[6]

Remanded.

[fol. 107] APPENDIX

We think it well to set forth the following arguments which we have not found it necessary to consider but which have been advanced to support a not altogether dissimilar conclusion.

It is urged that the Board, when it issued its hearing order of September 10, 1942, had in mind Section 411, which is to be read in the light of Section 2(a), (c) and (d). For, it is suggested, from the face of that order and from the explicit statements in the Board's opinion of May 24, 1944, describing the facts leading up to that order, the following appears: Grace, on December 16, 1941, filed a petition (called Docket No. 707) asking the Board to amend Panagra's certificate to extend its route from the Canal Zone to the United States. On April 29, 1942, Grace filed what the Board describes as a complaint (called Docket No. 744), pursuant to § 411, asking the Board to require Pan American to cease and desist from actions (alleged by Grace to be in violation of § 411), and ordering Pan

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[6] See, e.g., *Cleveland C. C. & St. L. Ry. Co.* v. *Hirsch*, 204 F. 849, 858, 859 (C. C. A. 6); *Scott Paper Co.* v. *Marculus Mfg. Co.*, U. S. (Nov. 13, 1945); 22 C. J. S. 1019.

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American to divest itself of its ownership of Panagra stock to the extent necessary to rid itself of its "negative control" of Panagra; in this complaint Grace renewed the request made in its previous petition (Docket No. 707). As the Board stated in its opinion, "no formal steps were taken by the Board in connection with the Grace petitions in Dockets No. 707 and 744 until September 1942." Then —according to the Board's own opinion—on September 10, 1942, the Board took such "formal steps in connection with the Grace petitions" by issuing its order (in what it called Docket No. 779) directing a hearing. The recitals of that order, it is said, make it plain that, although the Board stated that it was "acting upon its own initiative," the Board called that hearing because of the Grace peti- [fol. 108] tions. Nor, it is argued, was § 411 disregarded, for the order recited that the Board was proceeding "pursuant to the powers and duties vested in it under Titles II, IV and X of the Civil Aeronautics Act of 1938, as amended, and particularly § 401(h) thereof," and Title II of the Act includes § 411. (Pan American, in one of its briefs in this court, contends that the proceeding "was instituted not only under § 401(h), but also under Titles II and X * * *") Also prominent in the recitals of the Board's order are the statements that "unsatisfactory connecting service, if such exists, may result in air transportation service to the public between the United States and the west coast of South America which is inadequate and deficient as to both quality and quantity, and may also result in retarding the proper and sound development of air transportation service between the United States and the west coast of South America; and that such results would not be in the public convenience and necessity or in the public interest as defined in section 2 of said Civil Aeronautics Act of 1938, as amended; and that Pan American is the only air carrier authorized at the present time to engage in air transportation between the United States and South America, and that an additional service by another air carrier may provide competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."

It is then suggested that, just as in *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326

U. S. ——, so here the Board's decision as to its powers under § 401(h) without a simultaneous decision as to the alleged violation of § 411, may be seriously detrimental to the paramount public interest; and that therefore we must go behind the Board's present picture of the nature [fol. 109] of its proceeding in Docket No. 779 and remand for Board determination, in that proceeding, of the issues under § 411.

The Board argues that the report of its Examiners (pursuant to the Board's Regulation) resulting from the pre-hearing conferences, limited the scope of the hearing so as to preclude consideration of issues under § 411. Grace replies that in fact a vast amount of evidence pertinent to the issue under § 411 was received at the hearing, for it was recognized by everyone concerned that the relations between Pan American and Panagra affected both the issue of "public convenience and necessity" and the issue whether Panagra was "fit, willing, and able to perform" services involved in the proposed extension of its route. It is also said that the Board's Regulation as to the Examiners' Report on a pre-hearing conference, states that such report "shall control the subsequent course of the proceeding, but it may be reconsidered and modified at any time to prevent injustice"; the Board, it is suggested, should now be required to adapt the scope of the hearing to conform to the proof received, giving full opportunity to the parties to introduce further evidence, so far as necessary, relevant to the issue under s. 411.[7]

Pan American argues that it, as distinguished from its wholly-owned subsidiary, was not made a party to the hear-

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[7] It is suggested that that portion of the Board's amendatory order of October 22, 1942, denying "motions for consolidation of other applications and dockets with this proceeding" was ambiguous and that it may well have related not to Grace's petitions but to the motions of other air carriers to consolidate their applications for extensions with Docket No. 744; for, in April, 1942, the Board had announced that for the duration of the existing national emergency, no further action would be taken with respect to applications for authority to operate a new air transport unless special considerations of national interest were involved.

ing and therefore was not given adequate notice to justify an order affecting it under § 411. But, says Grace, Pan [fol. 110] American, on its own motion, was allowed to intervene and was active throughout the entire hearing.

Referring to § 1006, which provides that "no objection to an order of the Board shall be considered unless such objection shall have been urged before the Board," Pan American contends that the failure of the Board to proceed in Docket No. 799 under § 411 cannot be considered by us because Grace made no objection on that score before the Board. Grace replies that it objected to the Board's rejection of jurisdiction; and, since the Board's failure to act under § 411 involved a refusal by the Board to exercise its jurisdiction, Grace's objection was sufficient to raise that issue here, especially as Grace's right to maintain court review derives from the fact that it is vindicating the public interest, and this is not ordinary litigation between private persons.[8] In like manner Grace replies to the contention that it is estopped to raise any issue under § 411 because, before the Examiners, it took the position that the hearing did not extend to its complaint under that section, and because, in its petition in this court to review the Board's order of May 24, 1942, it has not objected to the Board's failure to act under § 411.

Grace asserts that the words "unfair methods of competition" in § 411 were taken from the Federal Trade Commission Act; that those words in that Act have been held to include conduct violative of the Sherman Act;[9] and that a corporation violates the Sherman Act if it uses its voting power in another corporation to prevent competition between the two corporations.[10]

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[8] It is also noted that Grace's petition for review contains a prayer for "such other relief as to the court may seem just and proper in the premises."

[9] *Federal Trade Commission* v. *Pacific States Paper Association*, 273 U. S. 52; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441; *Federal Trade Commission* v. *Keppel*, 291 U. S. 304, 310.

[10] *Bausch Machine Co.* v. *Aluminum Co.*, 72 F. (2d) 236, 239-240 (C. C. A. 2, cert. den. 293 U. S. 289).

[fol. 111] Pan American and the Board, however, argue that an order under § 411 may be directed only against an "air carrier," and that Pan American is not itself an air carrier, but merely a holding company completely owning Pan American Airways, Inc., which is an air carrier. *Per contra,* it is said that § 1(a) of the Act defines an "air carrier" to mean "any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangements, to engage in air transportation." It is further contended that a complaint under § 411 must be by an "air carrier" and that Grace is not such.

But it is answered that, as Grace charges that Pan American is illegally using its position in Panagra to prevent competition, Grace properly filed a derivative complaint, on Panagra's behalf, under § 411; and that, were such derivative action not possible, a carrier illegally utilizing control of another carrier corporation could, with resultant injury to the public interest, block the victimized carrier from filing a complaint with the Civil Aeronautics Board in the manner contemplated by § 411.

Answering the contention that, even when a proper complaint is filed under s. 411, the Board has an unreviewable discretion to decide whether it would be in the public interest to make such an investigation, it is said that here, by its own description of its action (in its September 10, 1942 order and its May 24, 1944 opinion), the Board has shown that it has already exercised that discretion, and that accordingly it could not arbitrarily abandon the hearing but should have continued it to find whether or not Pan American "is engaged in * * * unfair methods of competition," in which event the Board should have ordered Pan American to cease and desist.

It is also suggested that, in its hearing order, the Board said that it was acting, *inter alia,* under Title X of the Act, and that that Title includes § 1002. In a brief the Board [fol. 112] says that, if Grace's petition filed April 29, 1942 (Docket 744), may be considered in this proceeding, then "Section 1002 of the Act may have a limited bearing. If Grace should be held not to be an air carrier under the Civil Aeronautics Act, and hence without standing to file a complaint under § 411 of the Act, subsection (a) of § 1002, which grants in broader language the right to file complaints for violations of the provisions of the Act, might be relied

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upon as a basis for Grace's pleading." These provisions, it is urged, seem to have been substantially borrowed from 49 U. S. C. A. Sections 13(1) and 15, under which it has been held that the Interstate Commerce Commission must exercise its jurisdiction when a complaint is filed.[11]

[11] See, e. g., *I. C. C.* v. *Baird*, 194 U. S. 25, 39; *Louisville Cement Co.* v. *I. C. C.*, 246 U. S. 638, 642-643, 644-645; *I. C. C.* v. *Humboldt Steamship Co.*, 224 U. S. 474, 485.

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IN THE

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

W. R. GRACE & Co.,
Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO AND SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA, and PAN AMERICAN-GRACE AIRWAYS, INC.,
Respondents.

No. 19520

PETITION FOR REHEARING OF RESPONDENT PAN AMERICAN AIRWAYS CORPORATION

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Pan American Airways Corporation, a respondent herein, respectfully petitions the Court to reconsider its opinion filed January 28, 1946, and to grant a rehearing of the above entitled petition for review.

The grounds of this application are as follows:

(1) The decision of the Court is based entirely upon the determination of issues which were not before the Court on the petition for review. The grounds upon which the Court relies in its decision were not dealt with in the briefs filed with the Court prior to the argument or in the oral argu-

ment. The theory of the Court's decision differs also from that set forth in the request for supplemental briefs made by the Court subsequent to the oral argument. The Court has not only determined an important question of administrative law without brief or argument thereon but, in effect, has deprived the respondents of their right to be heard;

(2) The Court's decision that the Civil Aeronautics Board, as an incident to a proceeding concerned with the public interest, may determine private disputes between stockholders of the sort ordinarily cognizable in a court of equity is directly contrary to the decision of the Supreme Court in *Pittsburgh & West Virginia Ry.* v. *U. S.*, 281 U. S. 479 (1930). The Court is mistaken in relying on *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385 (1945), as in some manner qualifying or limiting the *Pittsburgh & West Virginia* case. This appears both from an analysis of the *Okin* case itself and from the recent decision of the Supreme Court, filed after the present case was submitted, in *Schenley Distillers Corporation, et al.*, v. *United States, et al.*, 66 Sup. Ct. 247 (1946);

(3) Even if the Board, in a proceeding properly designed for the purpose, had the power to determine such questions as whether the opposition of the respondent "to Panagra's applying for an extension was due to 'illegality and fraud'" (Op. 724),* to decide "as between Grace & Company and the Pan American Company, which should speak for Panagra" (Op. 725), and to rule "whether Panagra should be treated as applying for the extension" (Op. 727), it was error to hold that the Board could make such decisions in the proceeding the order dismissing which is here under review. The issues tried in this proceeding were purely and simply whether the *public interest* required a compulsory extension of Pan American-Grace's certificate. None of the issues which the Court has directed the Board to decide was presented by the order initiating this proceeding.

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* References "Op.—" are to pages of the printed opinion of this Court.

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I.

The decision of the Court rests solely on the determination of issues which were not before it on the petition for review. The Court has not only decided an important question of administrative law without the benefit of briefs or argument, but has deprived the respondents of their right to be heard.

The Court's opinion rests on a theory never advanced in the proceedings before the Board, in Grace's petition for review, or in the briefs or oral arguments of any of the parties before this Court. The theory is also sharply different from that put forward by the Court in its letter of November 29, 1945, requesting supplemental briefs. While this petition is in form a "Petition for *Re*hearing", it is thus in fact a request that the Court afford respondents an opportunity to be heard with respect to the theory on which the Court decided the case.

A brief statement of the issues before the Court and of the Court's decision is enough to demonstrate the correctness of this characterization.

The issues before the Court.

The issues presented to this Court for decision were the three issues raised by Grace's petition for review, to wit: (1) whether Grace has legal standing to secure review of the orders in Docket 779 which formed the subject of the petition for review; (2) whether the Board erred in deciding as a matter of law that it lacked statutory authority to compel the extension proposed; and (3) whether Grace had been denied a fair hearing on the issues on which the Board's decision was based; plus a fourth issue, added by Government counsel in their motion to dismiss the petition for review, namely, whether the order complained of was of a type that was subject to judicial review.

By letter of November 29, 1945, the Court put forward a tentative statement "of the nature and scope of the pro-

ceeding before the Board". This contained a suggestion, never previously advanced by anyone, that the Board's Dockets 707 and 744 might be deemed a part of the proceeding in Docket 779; that, since Grace's petition in Docket 744 had alleged that Pan American was engaging in unfair competition in contravention of Section 411 of the Act,* it might be possible for the Board in Docket 779 to order Pan American, *under Section 411,* to "cease and desist" from voting its stock in opposition to an application for the extension; and, as a final step, that since, as the tentative statement wrongly assumed, Grace's petition in Docket 707 was a part of the proceeding in Docket 779, the Board might be able, in the latter proceeding, to treat the petition *by Grace* in Docket 707 as an application *by Pan American-Grace,* derivatively filed, and proceed to grant relief under Section 401 (h)** as if a voluntary application had been made.

At the request of the Court, supplemental briefs were submitted by the parties, directed to the entirely new issues suggested by this tentative statement. No opportunity for oral argument was afforded, although this respondent requested that the case be set for further argument if the Court was not persuaded by the briefs.

The decision of the Court.

Except for the issues as to Grace's legal standing to secure a review and as to the immunity to review of the orders complained of, which were decided by implication favorably to Grace, *all of the issues set out above* were either decided or resolved *arguendo* in a manner favorable to the positions taken by respondents. Thus, the Court assumes that the Board was right in its holding if the case was to be regarded as it always had been—namely, as a compulsory extension proceeding. It concedes that Dockets 707 and 744 were not included in the proceeding (Docket 779) the order dismissing which is here under review, and that no question of relief under Section 411 is

* 49 U. S. C. §491.

** 49 U. S. C. §481(h).

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involved. The Court likewise agrees that the proceeding in Docket 779 began as a Section 401 (h) proceeding and so continued throughout. It upholds respondents' position that the scope of the proceeding is to be measured by the directory part of the Board's order instituting the proceeding, and not by recitals in that order nor by what the parties said in argument, in briefs, or in the course of the hearings. The Court thus agrees that the issues before the Board were limited to a determination of whether public convenience and necessity required the extension proposed (Op. 721-23).

However, in spite of all this, the Court proceeds to decide *against* the respondents, on the basis of the wholly novel suggestion that the Board had power, which it *must* exercise, to determine *in this proceeding* whether Pan American had so exercised its voting power in Pan American-Grace as to be guilty of "illegality and fraud"; that, if such charges could be established, the Board should then consider that Grace, speaking for Pan American-Grace, should be deemed to have filed *in this proceeding* an effective "consent" to the extension on behalf of Pan American-Grace; and that this in some way would permit the Board to treat the existing compulsory proceeding under Section 401(h) as a voluntary proceeding under Section 401(d),* so that the Board could determine whether public convenience and necessity required the extension exactly as if a voluntary application had been filed.

We will show in Points II and III below why we consider the Court's decision to be wrong. What we seek to bring out in this Point is that the Court has made determinations which are so novel and which have such important implications upon the jurisdiction of Federal administrative agencies as to require full briefing and argument, and that the Court has not given the respondents the hearing which the law requires.

A decision that in a certificate proceeding a Federal administrative agency concerned with transportation must consider issues of fraud and illegality as between stock-

* 49 U. S. C. §481(d).

holders, introduces, to say the least, a new notion in administrative law. The Civil Aeronautics Board is concerned with the interest of the public and of the respective air carriers,—not with disputes internal to a particular carrier. The finding of public convenience and necessity contemplated by Section 401(h) of the Act is a finding whether the proposed certificate amendment is desirable from the standpoint of *public* welfare, not whether one stockholder in an air carrier has acted prejudicially to the *corporate* welfare by refusing to sanction a request for such an amendment. While the Board can doubtless take an intra-corporate dispute into account in a certificate proceeding *in determining the fitness and ability* of a carrier to operate additional air service, there is nothing in Section 401 of the Act to indicate that the Board has power to take action resolving the dispute or determining the legal rights and duties of contesting stockholders. Certainly a decision so extending the jurisdiction of Federal administrative agencies concerned with the regulation of transportation ought not be made to meet a particular fact situation or without the fullest opportunity for argument. Especially is this true under a statute which prohibits the court's even considering an objection to an order "unless such objection shall have been urged before the Board or if it was not so urged, unless there were reasonable grounds for failure to do so". Civil Aeronautics Act, §1006(e).*

The decision of the Court, based as it is on a determination of issues which have not been raised, briefed or argued before the Board or before this Court, is a denial of a fair hearing to respondents and is opposed to the universal rules of appellate practice that a reviewing court will not consider points not raised before it by the parties and that a reviewing court may not change the theory on which a cause was tried below. *Blair* v. *Osterlein*, 275 U. S. 220 (1927); *Jones* v. *Tower Production Co.*, 120 F. (2d) 779 (C. C. A. 10th, 1941); *Hutchinson* v. *Fidelity Investment Ass'n*, 106 F. (2d) 431 (C. C. A. 4th, 1939); *Osgoodby* v. *Talmadge*, 45 F. (2d) 696 (C. C. A. 2nd, 1930).

* 49 U. S. C. §646(e).

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II.

The decision of the Court that the Civil Aeronautics Board, as an incident to a proceeding concerned only with the public interest, must determine private disputes between stockholders of the sort ordinarily cognizable in a court of equity is directly contrary to the decision of the Supreme Court in *Pittsburgh & West Virginia Ry.* v. *U. S.* The Court is mistaken in relying on *Securities and Exchange Commission* v. *Okin* as qualifying or limiting the *Pittsburgh & West Virginia* case.

The decision of the Supreme Court in *Pittsburgh & West Virginia Ry.* v. *U. S.*, 281 U. S. 479 (1930), is a square authority that, in the absence of special statutory provisions, Federal administrative bodies have no power to inquire, in proceedings properly before them, into collateral issues raised by disputes between stockholders as to who has the right to speak for a carrier. The essence of the decision there was that a Federal administrative body must take the carrier as it finds it, and that disputes between the carrier's stockholders are left for determination to the courts of general jurisdiction. That decision is controlling here unless later decisions of the Supreme Court have impaired its authority. This, indeed, is recognized by the Court itself (Op. 723).

Because of this, and because there has been no opportunity to discuss the point in previous briefs or argument, it becomes necessary to analyze in some detail both the decision in the *Pittsburgh & West Virginia* case and the later decision thought by the Court to have weakened it.

A. The *Pittsburgh & West Virginia* case rules the instant case.

In the *Pittsburgh & West Virginia* case, the Pittsburgh & West Virginia Ry. Co. (hereinafter referred to as "the Pittsburgh") was a minority stockholder in the Wheeling &

Lake Erie Ry. Co. (hereinafter referred to as "the Wheeling"). The Wheeling applied to the Interstate Commerce Commission for certificates of convenience and necessity under Section 1(18) to (20)* of the Interstate Commerce Act, one for permission to abandon its existing station in Cleveland, and the other for authorization to use the facilities of a proposed union terminal which was being built by carriers owning a majority of the Wheeling's stock.

The Pittsburgh raised before the Commission questions both public and private in character. Among the latter was a claim that directors who had authorized the Wheeling's applications had been elected by stock owned by carriers which had an interest in the new terminal project adverse to that of the Wheeling and which had acquired their stock in the Wheeling in violation of the anti-trust laws. In other words, the Pittsburgh claimed, in effect, that it, rather than the Wheeling's directors, was entitled to "speak for" the Wheeling, and that the certificate application filed by the directors in the name of the Wheeling should be disregarded. The Commission granted the applications, ruling favorably on the issues of public interest and holding that the private controversies between the Pittsburgh and the other stockholders of the Wheeling were not within its jurisdiction.

The Pittsburgh then brought a bill in equity in the District Court for Northern Ohio, naming as defendants the Wheeling, various other carriers which were stockholders in the Wheeling, the Interstate Commerce Commission and the United States, to enjoin the Wheeling from abandoning its present station and performing its contracts to utilize the union terminal, and to set aside the order of the Commission granting certificates of public convenience and necessity for abandonment and new operation. The case came on for hearing before a three-judge court convened pursuant to the Urgent Deficiencies Act, 38 Stat. 208, 219-220. The lower court held that the bill united two different causes of action, a suit under the Urgent Deficiencies Act

* 49 U. S. C. §1(18-20).

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to enjoin the enforcement of the Commission's order, and a suit based upon diversity of citizenship between the Pittsburgh and the carrier defendants. The three-judge court sustained the Commission's order on the merits. The District Judge concurring in the judgment, the court also directed the dismissal, on the merits, of the portion of the bill seeking relief against the carrier defendants, reserving to the Pittsburgh the right to sever the latter issues for purposes of appeal and to treat the decision on them as that of a single judge.

The Pittsburgh prosecuted a direct appeal to the Supreme Court from the entire decree. With the portion of the Supreme Court's opinion which ruled that the Pittsburgh had no standing to obtain review of the Commission's order, we are not now concerned. For present purposes, the vital point in the Supreme Court's decision, and one which is decisive against the ruling now made by this Court, is the holding that insofar as the Pittsburgh's suit sought relief against the Wheeling and its majority stockholders, such a bill could not properly be joined with a bill to enjoin the Commission's order. For, as said by Mr. Justice Brandeis, such a suit was "neither ancillary to nor dependent upon the judgment as to the order."

If the Commission could properly have taken cognizance of the Pittsburgh's claim that the Wheeling's application to the Commission had been filed as a result of action of the Wheeling's directors which was adverse to the Wheeling's interests, the portion of the Commission's order rejecting this claim of the Pittsburgh would have been a proper subject of a bill for an injunction before a three-judge court, and the suit against the Wheeling and its majority stockholders would clearly have been ancillary thereto. The Supreme Court's decision that the Pittsburgh's protest against the action of the Wheeling directors could be heard only in a stockholder's suit in a court of general equity jurisdiction, is thus a clear holding that such issues were not properly cognizable in the administrative certificate proceeding.

The direct application of the *Pittsburgh & West Virginia* case to the case at bar is manifest. If, as the Supreme Court held, it would have been beyond the jurisdiction of the Interstate Commerce Commission to inquire whether the Wheeling's applications for certificates were filed as a result of "illegality and fraud" on the part of the Wheeling's directors or stockholders, it is equally beyond the powers of the Civil Aeronautics Board to determine similar issues with respect to the *failure* of Pan American-Grace to file an application for a certificate desired by one of the stockholders and not by the other.

This Court recognizes in its opinion that the problem before the Supreme Court in the *Pittsburgh & West Virginia* case was essentially the same as that arising here. It says that "in spite of some differences which we will point out, we might feel that decision conclusive here, were it not for the decision in *American Power & Light Co.* v. *Securities and Exchange Commission*, 325 U. S. 385, particularly that part of it which dealt with Okin's appeal" (Op. 723). So far as we can see, the Court does not point out the differences referred to and, as we will now show, the Court was mistaken in its belief that the *Okin* case had in any way impaired the controlling effect of the *Pittsburgh & West Virginia* decision upon the instant case.

B. The *Okin* case in no way impairs the authority of the *Pittsburgh & West Virginia* case.

The *Okin* case involved the right of a stockholder to secure review, under Section 24(a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79x(a)), of approval by the Securities and Exchange Commission of a financial transaction affecting the corporation in which he held stock.

The proceedings before the Securities and Exchange Commission had begun on joint applications and declarations filed by American & Foreign Power Co., and its parent Electric Bond & Share Co. under sections 6(a), 7, 9(a)(1), 10, 12(b), (c), (d) of the Public Utility Holding Company Act* and Rules U-23, U-42, U-44, U-45 and U-50 of the

* 15 U. S. C. 79f(a), 79g, 79i(a)(1), 79j, 79l(b)(c)(d).

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regulations thereunder. These applications and declarations sought approval of a plan under which American & Foreign Power would refinance a $35,000,000 note held by Electric Bond & Share by issuance to Electric Bond & Share of 3% serial notes for $30,000,000 and a cash payment of $5,000,000. Electric Bond & Share sought permission also to sell bonds of other subsidiaries and use the proceeds, together with the $5,000,000 received from American & Foreign Power, to purchase its own preferred stock in the open market to offset loss of income from the refinancing.*

Okin, a stockholder of Electric Bond & Share, appeared in the proceedings before the Commission. He urged that the income of Electric Bond & Share would be reduced as a result of the refinancing, thus reducing the value of his stock. Over his objection, the Commission granted approval. Okin thereupon sought review of the Commission's order and the Supreme Court, affirming a decision of this Court, held that Okin was a "person or party aggrieved" within the meaning of Section 24(a) of the Public Utility Holding Company Act.

The question before the Securities and Exchange Commission on Electric Bond & Share's applications was not merely whether the proposed transactions were consistent with the public interest generally, but also, in the language which runs through the Public Utility Holding Company Act, whether they were consistent with "the interest of *investors* or consumers". The Securities and Exchange Commission thus had to consider not only whether the transactions were in the interest of Electric Bond & Share considered as a corporate entity, but also whether they were in the interest of each of its security holders. This being the question which the Securities and Exchange Commission must decide, it is altogether natural that the Commission requires notice to be given not only to the corporations which are parties to the transactions but directly to security holders, either through mailing or through publication in

* *In the Matter of Am. & Foreign Power Co., Inc.; Electric Bond & Share Co.*, S. E. C. Release No. 4855, Jan. 25, 1944.

the Federal Register (Rule U-23), and permits such security holders to appear. When such a security holder appears before the Securities and Exchange Commission in opposition to a proposed transaction, it is not necessary that he establish that the management was guilty of illegality or fraud in proposing the transaction. All that he need show is that the transaction will not conform to the requirement of investor protection prescribed in the Act.

In other words in a Public Utility Holding Company Act proceeding such as that in the *Okin* case, a stockholder has a standing separate and apart from the corporation. It was in recognition of this that the Supreme Court sustained Okin's status to seek review. The Supreme Court did not have its decision, as this Court seems to believe, upon the ground that Okin might be heard to assert derivatively a right of the Electric Bond & Share Company, but on the broader view that, quite apart from any question of derivative right, he fell within the comprehensive language of Section 24(a). As the Supreme Court said (p. 392), "we do not deem it essential that the proceeding have the character of a derivative suit."*

Putting the matter in another way, the Public Utility Holding Comany Act of 1935 had already taken final determination of the question whether the refinancing proposed by Electric Bond & Share was or was not consistent with the interests of its *stockholders* from the management of that corporation and vested it in the Securities and Exchange Commission. The Supreme Court's holding was simply that a stockholder whom that Commission had heard was a "person or party aggrieved" who could seek judicial review. Such a holding is in no way inconsistent with the *Pittsburgh & West Virginia* decision that a Federal administrative agency concerned with carriers and not with their stockholders is to take applications or lack of applications as it finds them and is not to determine whether, as in the

* Apparently not only a stockholder but a consumer could be a "person or party aggrieved" entitled to petition for review under Section 24(a) of the Public Utility Holding Company Act. See *Associated Industries* v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2d, 1943), and particularly footnote 31 to the opinion of Judge Frank.

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Pittsburgh & West Virginia case, the making of the application, or, as in this case, the failure to make one, was due to "illegality and fraud". Certainly there is nothing in the *Okin* case which remotely supports the proposition that Federal administrative agencies having jurisdiction over transportation have been empowered to go into a dispute between stockholders as to whether an application for a certificate should be made and, if it decides in favor of the party advocating the application, to exercise the power of an equity court to take *pro tanto* the management of the corporation into its own hands and convert a compulsory extension proceeding into a voluntary one.

The suggestion that the authority of the *Pittsburgh & West Virginia* case was in any way impaired by the decision in the *Okin* case thus overlooks the difference between the statutory duties of the Securities and Exchange Commission and of Federal agencies concerned with transportation. It depends upon placing the *Okin* decision on a ground on which the Supreme Court expressly declined to rely. And, if this were not enough, it confronts two other difficulties as well. The first of these is that in the *Okin* opinion the Supreme Court expressly cited the *Pittsburgh & West Virginia* case without in any way reflecting on its authority. The second is that any possible doubt as to the continued standing of the *Pittsburgh & West Virginia* case has been removed by its recent approving citation by the Supreme Court in a decision announced after this case was submitted, *Schenley Distillers Corp. et al.*, v. *U. S. et al.*, 66 Sup. Ct. 247 (1946).

C. The rule of the *Pittsburgh & West Virginia* case is sound.

The rule of the *Pittsburgh & West Virginia* case rests upon considerations fundamental to the administrative process. It recognizes that administrative agencies should not be diverted from their duties of carrying out a regulatory statute in the *public interest* by time consuming proceedings to adjudicate mere private legal rights. Under the rule announced by the Court in this case, any stockholder of an air

carrier who disagrees with the management of his company as to the wisdom of applying for a particular route, by merely alleging "fraud" and "illegality", however flimsy the bases of these allegations may be, can force the Board not only to determine whether these charges are established, but also, since the issues are "intricately intermeshed" (Op. 727), to consider whether public convenience and necessity require the particular service proposed. It is one thing to say that the duty of considering complaints of this character, in holding company cases on which it must pass in any event has been imposed upon a body like the Securities and Exchange Commission which is expressly charged with the protection of investor interests. It is quite another thing for a court to impose such jurisdiction on an agency charged with protecting the public interest in air transportation, where there is not the slightest indication in the statute that such was the will of Congress.

There is little reason for supposing that Congress would have desired to take such issues of private right from the courts and vest them instead in an administrative agency such as the Civil Aeronautics Board. The peculiar competence of administrative agencies cannot be deemed to extend beyond matters related in some fairly direct way to the purposes of the statute under which the particular administrative body functions. The overall purpose of the statute creating the Civil Aeronautics Board is the advancement of the *public* interest by the promotion of civil air service. The Board's special competence relates to the special economic and operational characteristics of airplanes and the service afforded by them. On the other hand, a proceeding in the nature of a minority stockholder's suit raises issues fundamentally legal in nature and of a sort customarily dealt with by courts of general jurisdiction. An administrative body has no special competence to deal with legal issues of this kind. Indeed, the task which the Court has imposed upon the Board of considering the same fact, first from the purely legal standpoint of private right, and second from the broad economic standpoint of public interest, without allowing its views on the second issue to affect its decision of the first is an almost impossible one to perform.

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From the standpoint of protection of the stockholder also, it does not seem likely that Congress intended to take jurisdiction over intra-corporate disputes of transportation companies from the courts and confer it upon Federal administrative agencies. Historically, except for certain narrow exceptions, the power to take the management of a corporation out of the hands of its directors and to allow one stockholder to speak for the others has inhered in courts of equity and in them alone. In a proceeding before such a court, a stockholder has the protection of the rules of evidence and of the judicial process generally, as well as the privilege of full review by an appellate court. If, on the other hand, jurisdiction over such disputes lies in an administrative agency, a stockholder enjoys none of these rights in the course of the trial, and upon an attempt to secure review encounters the contention of administrative finality on questions of fact and perhaps on "mixed questions" of law and fact as well.

Actually, in the present case there is the gravest doubt whether if the Board were to decide the issues directed by the Court in a manner adverse to Pan American, the respondent could secure *any* judicial review at all. The Court specifically directs the Board to decide the issues whether Grace is entitled to speak for Pan American-Grace and whether the public convenience and necessity require the extension to be granted, not *seriatim* but together (Op. 727). A decision determining both of these issues in favor of the contentions of Grace would be subject to the approval of the President under Section 801 of the Act.* Under the decision of this Court in *Pan American Airways* v. *C. A. B.*, 121 F. (2d) 810 (C. C. A. 2d, 1941), there would be serious doubt whether there could be judicial review of the Board's determination even of the purely legal issues raised by the stockholder suit aspect of the case. It is not lightly to be assumed that Congress intended the private rights of stockholders in companies engaged in foreign air transportation to be left to such conclusive administrative determination or, indeed, that it constitutionally could do so.

* 49 U. S. C. §601.

III.

Even if the Board has power to decide the issues of private right referred to it by the Court, it cannot exercise that power in this proceeding.

The Court seems to be proceeding on the assumption that the Board can now promptly proceed to decide the issues of "fraud" and "illegality" referred to it by the Court. This, we respectfully submit, is quite contrary to the fact.

As discussed in Point I above, this proceeding has never been considered by the Board nor by any of the parties as involving questions of "fraud" or "illegality", the adjudication of such questions, or the possibility of affirmative action thereon. The Board's order of September 10, 1942 instituting the proceeding certainly contained no notice that such action was contemplated. If such issues are now to be determined by the Board, Pan American and all other parties must be given an opportunity to adduce and direct evidence to these new issues, and also to present briefs and oral argument thereon. *Morgan* v. *U. S.*, 304 U. S. 1 (1938); *Ohio Bell Tel. Co.* v. *Comm'n.*, 301 U. S. 292 (1937).

On the other hand, if the Board's opinion is affirmed, while Docket 779 is terminated, Dockets 707 and 744 remain pending. Whatever powers the Board may ever have had to deal with this controversy, except on the theory of compulsory extension as to which the Court does not disagree with the Board's conclusions, remain unimpaired by the order here under review, and can be exercised with as much despatch as they can be in Docket 779. The situation is wholly different from that in *Ashbacker Radio Corp.* v. *F. C. C.*, 66 Sup. Ct. 148 (1945), where the action of the Federal Communications Commission in granting the application of one applicant for all practical purposes denied the other applicant the right to the hearing contemplated

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by Congress. In view of this, it is difficult to see any conceivable advantage in attempting to force an adjudication of questions of alleged abuse of voting power by Pan American *into the present proceeding*, which has gone forward to date under an entirely different theory.

We cannot escape the impression that the Court's action was inspired in large part by a fear that, as a result of the pendency before the Board of the *Latin American Certificate* case, Docket No. 525, a decision affirming the Board's order of dismissal and remitting Grace to the remedies of a stockholder's suit or of proceedings in Dockets 707 and 744 might, for practical reasons, be an empty gesture. Apart from the fact that the courts have been continuously open to Grace since 1938 when this dispute commenced, and that it has likewise been possible for Grace through much of this period to press the Board to take action in Dockets 707 or 744, the answer to this fear is that the remand directed by the Court likewise will involve further proceedings before the Board and that less time would be taken in an appropriate proceeding where the issues were properly framed than by attempting to use a record nearly three years old which was developed on entirely different theories. Grace has already made a motion in Docket 525 that the Board withhold any recommendation to the President or withdraw any recommendation already made for the certification of any carrier other than Pan American-Grace between Balboa and Miami until the further proceedings in Docket 779 which the Court has directed are had. Grace could have made, and can still make, the same request with reference to proceedings in Dockets 707 and 744.

Wherefore, for the reasons stated, respondent Pan American Airways Corporation respectfully prays that rehearing be granted and that this petition for review be placed upon the calendar for reargument upon new briefs and upon such reargument, that the petition for review

be dismissed or the orders of the Civil Aeronautics Board be affirmed.

Dated February 11, 1946.

Respectfully submitted,

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JAMES P. KRANZ, JR.,
JOHN P. APICELLA,
of Counsel.

Certificate

I hereby certify that the foregoing application for rehearing is not made for purposes of delay, but because in the opinion of counsel for respondent Pan American Airways Corporation the Court has misinterpreted certain decisions of the Supreme Court which I believe to be controlling in this proceeding, and has decided this cause upon issues which, through no neglect or fault of counsel, have not been briefed or argued. I believe the foregoing petition for rehearing to be well founded in law and that the same is proper to be presented and filed.

(Signed) HENRY J. FRIENDLY.

HENRY J. FRIENDLY,
Attorney for Pan American Airways Corporation.

IN THE

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

No. 19520

W. R. GRACE & CO.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,
PAN AMERICAN AIRWAYS CORPORATION,
PAN AMERICAN AIRWAYS, INC.,
EASTERN AIR LINES, INC.,
NATIONAL AIRLINES, INC.,
CHICAGO AND SOUTHERN AIR LINES, INC.,
TACA, S. A.,
DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA,

and

PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

PETITION OF EASTERN AIR LINES, INC. FOR REHEARING

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New York, N. Y.
February 11, 1946.

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PETITION OF EASTERN AIR LINES, INC. FOR REHEARING

Preliminary Statement

Eastern Air Lines, Inc. ("Eastern") petitions the Court for rehearing with respect to the decision, dated January

28, 1946, in this proceeding. As we understand that decision, it appears to order the Civil Aeronautics Board:

1. To consider the "petition" of W. R. Grace & Co. under Docket 707 as an "application" filed on behalf of Panagra if the Board finds that Pan American Airways Corporation has acted "fraudulently" and "illegally" in refusing to permit Panagra to file an application; and

2. To consider and decide such "application", if it exists, as a part of the proceeding under Docket 779.

The Court has plainly indicated that the Board's decision was correct on the ground stated by the Board—namely, that the Board lacked the power under the Civil Aeronautics Act, in the absence of an application by Panagra, to *compel* an extension of Panagra's system 1200 miles to the United States in competition with Panagra's co-owner, Pan American. Grace objected to the Board's decision, before both the Board and this Court, *only* on the ground stated by the Board, conceding that no application had been filed by or on behalf of Panagra.

Under such circumstances, we submit that, for reasons set forth hereinafter, the Court should have affirmed the decision of the Board. Instead, the Court has itself suggested an objection to the Board's order *never suggested by any party* and directly contrary to the position taken by Grace. Such action by the Court is, we submit, improper and contrary to the express provisions of the Act.

The conclusions and reasoning of the Court are not supported by any of the facts or the law of this case, by the history of the proceeding under Docket 779, or by any objection raised by Grace before the Board or before this Court; they are directly contrary to the position taken by Grace throughout the proceeding before the Board and this

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Court; they are based on material not in the record and not subject to judicial notice; and they are contrary to the expert findings of the Board and contrary to well established rules of judicial review of administrative proceedings.

I

The Court Cannot Properly, on Review, Consider an Objection to the Board's Order Not Raised Before the Board, and in Fact Contrary to the Position of All Parties Before the Board and Before This Court.

It is plain that the Court has decided the case on a ground not presented to the Board and *never* suggested by any party to this proceeding.

The Court apparently has ruled that the Board erred in failing to consider the possibility that Grace's "petition" under Docket 707 was an "application" on behalf of Panagra which should be considered under Docket 779. A most diligent search of the record will reveal no suggestion by Grace or anyone else that such a construction could be placed on Docket 707. We shall point out later that the Board did hold that Docket 779 did *not* include any application on behalf of Panagra—a holding directly contrary to the suggestion of the Court. But the important fact at this point is that the objection which the Court has raised to the Board's order was never raised before the Board.

It is a well established rule, even in the absence of a statutory provision reinforcing it, that a reviewing court will not consider objections which were not presented to the administrative agency. *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 206 (1935); *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498 (1937). As the Supreme Court said in *Helvering* v. *Cement Investors*, 316 U. S. 527, 535 (1942):

> "We will not consider here for the first time * * * a question not fairly within the issues as framed by the Commissioner and hence not decided below."

This rule is closely allied to the one requiring a party to exhaust all administrative remedies before seeking judicial review—a rule based on the principle that the expert administrative agency should first rule on all points within its field. *United States* v. *Abilene etc. Ry.*, 265 U. S. 274 (1924); *Delaware etc. Co.* v. *United States*, 266 U. S. 438 (1925); *Beaumont etc. R. R.* v. *United States*, 282 U S. 74, 87 (1930); *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50-52 (1938).

The usual rule forbidding consideration by the reviewing court of objections not raised before the administrative agency is greatly strengthened in this case by express statutory provision. Section 1006(e) of the Civil Aeronautics Act provides as follows:

> "No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

The language of this provision is clear on its face. Whatever power the Court may have in cases where no similar statute is involved, plainly it has no power on review of a decision of the Civil Aeronautics Board to raise *on its own motion* an objection not previously urged before the Board unless there were reasonable grounds for not urging such objection. Grace has advanced and could advance no reasons for not having urged any available objection before the Board. Certainly Grace knew all of the facts known

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to the Court, and it was not suffering from any disability or lack of adequate representation by counsel.

Similar statutory provisions have been accorded greatest deference by courts in other cases. In *Todd* v. *Securities and Exchange Commission*, 137 F. (2d) 475, 477, 478 (C. C. A. 6th, 1943), the court held as follows:

> "Respondent and the System contend that none of these points can be raised in this court upon the ground that Section 24(a) requires as a condition precedent to the right to review an order of the Commission that the objections made shall have been urged before the Commission or that there were 'reasonable grounds for failure so to do.' • • • Under Section 24(a) • • • consideration is forbidden of certain points raised here for the first time, such as that dissolution of the System cannot presently be made in advance of decision by the Commission as to action required of the subsidiary companies, or that the order is vague and uncertain • • • Since the Commission is not empowered to rule upon the constitutionality of statutes, the fact that the constitutional objections were not raised before it, as a matter of abstract justice perhaps should not preclude the assertion of such questions in this court. But the wording of Section 24(a) is inclusive enough to embrace every kind of question, whether of law or fact. The Commission was established by congressional enactment, and the right to review its order likewise is given by Congress. Conditions under which the right may be exercised are within the power of the Congress to define, and one condition is that any question relied on in this court must have been urged before the Commission. We conclude that the constitutional questions are not before us."

It would seem obvious that, if questions which could not be decided by the administrative agency are nevertheless beyond the power of a court to review on appeal where they have not been presented to the administrative agency, the question on which the Court based its decision in this case could not properly be considered by the Court. The Board had full power to determine whether or not Grace's "petition" under Docket 707 could be considered an application filed on behalf of Panagra. As a matter of fact, the Court itself has held that the Board is in a far better position to determine this question than is the Court. It follows that this is precisely the type of case which Congress contemplated in Section 1006(e) of the Act, and that the Court is therefore forbidden to consider the objection to the Board's order which forms the basis for the Court's decision.

We also call the Court's attention to the following additional decisions relating to statutory provisions similar to Section 1006(e) of the Act. In *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 597 (C. C. A. 9th, 1943) the court said:

> "No such issue was raised affirmatively by respondents in their pleadings, at the hearing before the Board, in their exceptions to the Trial Examiner's intermediate report which recommended reinstatement with back pay, or in their briefs in support of said exceptions. Although the Phelps Dodge decision was rendered approximately six months before that in the instant case, respondents at no time contended before the Board that any employee had wilfully incurred losses which should be deducted. Not having objected on this ground when the matter was before the Board, respondents are now barred by Section 10(e) of the Act from raising the point."

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This Court made a similar holding in *National Labor Relations Board* v. *Elvine Knitting Mills*, 138 F. (2d) 633, 634 (C. C. A. 2d, 1943). The Court there said:

> "In a supplemental brief respondent asserted that the Board's petition was barred by reason of a statute passed after the petition was filed in this court * * * The Board * * * asserts that such a claim is not within our powers of review, under §10(e) of the Act, 29 U. S. C. A. §160(e) * * * contentions which we understand respondent substantially conceded in the argument and with which we agree." See also *Armour & Co.* v. *Brown*, 137 F. (2d) 233, 239 (Emergency Court of Appeals, 1943).

It is to be noted that the statutory provision referred to by the Court is quite similar to Section 1006(e) of the Civil Aeronautics Act, as it provides that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

An analogous situation is presented by the cases in which courts have refused to remand to the administrative agency for the taking of further evidence where the party had not sought to introduce such evidence at the time of the original hearing. In *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494, 497 (C. C. A. 3d, 1943), the court said:

> "Since the Company thus had full opportunity to offer its evidence upon these alleged wrongful acts before the Board, but failed to take advantage of it, the Company is not now entitled to a second opportunity."

In *Athens Roller Mills* v. *Commissioner*, 136 F. (2d) 125, 128 (C. C. A. 6th, 1943), the court said:

> "There would be no assurance of any end to litigation over taxes if either the taxpayer or the Commissioner could raise on appeal new issues of fact which facts were in the possession or available to the party before the hearing by the Board."

It is submitted that, if the parties are to be prevented from raising new issues of fact or law on appeal, the reviewing court itself clearly should not prolong and complicate the litigation by adding new issues *on its own motion.*

In view of Section 1006(e) of the Act and the uniform judicial decisions construing similar statutory provisions as prohibiting consideration on review of issues not raised before the administrative agency, we submit that this Court cannot properly consider the point on which its decision rests in this case. Having determined that the objections which were raised by Grace before the Board and the Court have no substance, the Court's only remaining duty is to affirm the Board's order.

We wish to point out in passing that, not only did Grace not raise before the Board or the Court the objection to the Board's order on which the Court's decision appears to be based, but that objection is directly contrary to the position taken by Grace throughout the proceeding. It is obvious that, if the Board were to find that Grace's petition under Docket 707 was an application filed on behalf of Panagra, it would be required under this Court's mandate to decide the issues relative to Section 411 of the Act raised in Grace's petition under Docket 744. In other words, the Court's opinion apparently instructs the Board that it may find Docket 707 to be an application on behalf of Panagra only

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if it finds that Pan American is guilty of the practices prohibited under Section 411.

Grace has consistently taken the position throughout the proceeding that the issues raised in Docket 744 with respect to Section 411 of the Act have no relationship to the proceeding under Docket 779. As the Court's opinion points out, Grace's petition for review addressed to this Court specifically stated as one of the alleged errors by the Board that:

> "The Board erred in taking into consideration, as bearing on its jurisdiction under Section 401(h) of the Civil Aeronautics Act, any controversy between the co-owners of Panagra" (Tr. 146-147).

Thus, far from asserting that the Board should look into the conflict between Grace and Pan American and into the practices of Pan American with which Grace has taken issue, Grace objected to the Board's having so much as mentioned those matters in its opinion.

The Court's opinion further quotes Grace's position prior to the hearing before the Board as to the issues which should be considered under Docket 779. Grace then asserted that:

> "the scope of Docket No. 779 does not include the issues raised by Grace in Docket No. 744 with respect to Section 411 • • • If the Board wishes to pursue this subject (questions of corporate control and management) further, it should grant the petition of Pan American for an investigation under Section 415 of the Civil Aeronautics Act, just as it should institute proceedings under Section 411 as requested by Grace in Docket No. 744 if it wishes to pursue all the questions raised by Grace in Docket No. 744. These, we

submit, should, in any event, be separate proceedings from the instant one, so as not to delay or obstruct the prompt disposition of this proceeding. Grace does not believe that the Board should go into those issues here or the extensive and complicated issues as to the applicability of Section 408 when it is abundantly apparent that neither Section 408, 411 or 415 is relevant to the instant proceeding."

There are many other indications in the record that Grace strongly felt and urged that the issues involved in Section 411 of the Act and Docket 744 should not be considered under Docket 779. Some of those indications have already been set forth in the supplemental briefs filed by Eastern, Pan American and the Board, and they will not be repeated here.

As previously demonstrated, it is irregular and improper for a reviewing court, under facts and circumstances similar to those in this proceeding, to consider objections not raised before the administrative agency. It is even more extraordinary and irregular for the reviewing court *to originate* an objection never suggested by a party even on appeal, and it is most unusual, and we think it is improper, for the reviewing court to originate an objection which is directly contrary to the position taken throughout the proceeding and on appeal by the party in whose favor the reviewing court renders judgment. We submit that it is not the function of a reviewing court, in the very limited type of review authorized by Congress under the Civil Aeronautics Act, to suggest arguments not made by counsel, and which counsel could not have suggested in view of prior positions and stipulations made by such counsel.

It should be observed in this connection, that the action of the Court in deciding the case on an issue never raised

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by any party, and not clearly indicated in any communication from the Court to the parties, has had the effect of depriving the parties of the fair hearing to which they are entitled. We again call the Court's attention to the following language from *Morgan* v. *United States*, 304 U. S. 1, 18 (1938):

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one."

We also call attention to the further language of the Supreme Court in the *Morgan* case (304 U. S. 1, 19-20) demonstrating that courts, fully as much as administrative agencies, are required to grant a fair hearing:

> "Congress, in requiring a 'full hearing', had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

The only suggestion which even pretends to justify the Court's consideration of a point not raised before the Board is mentioned in the "Appendix" to the Court's opinion, which, as we understand it, sets forth the arguments which the Court did *not* adopt. It is there stated that:

> "Grace replies that it objected to the Board's rejection of jurisdiction; and, since the Board's failure to act under §411 involved a refusal by the Board to exercise its jurisdiction, Grace's objection was sufficient to raise that issue here, especially as Grace's right to maintain court review derives from the fact that it is vindicating the public interest, and this is not ordinary litigation between private persons."

Reference is also made in a footnote to the fact that Grace's petition contains a general prayer for relief.

Obviously such general objections or prayers for relief cannot satisfy Section 1006(e) of the Act. In the first place, the prayer for relief is directed to the *Court*, not to the Board. In the second place, Section 1006(e) would be vitiated completely if its requirements were held to be met by a mere general objection to the Board's action. The plain purpose of the Section is to require objections to be *specified* so that the reviewing court will have the benefit of the Board's expert ruling on the subject. Moreover, it is to be noted that all actions of the Board under the Act are required to be in the public interest or in accordance with the public convenience and necessity. Hence it would be possible for any party seeking review in any case to assert that he was "vindicating the public interest."

Congress, in passing Section 1006(e) was not doing a useless thing. The Court should not render that essential provision of the statute nugatory by any such interpretation as that suggested in the language quoted above.

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II

Grace's Petition Under Docket 707 Could Not Under Any Circumstances Be Considered an "Application" on Behalf of Panagra, and in Any Event It Cannot Be Considered in the Proceeding Under Docket 779.

The Court's opinion appears to order the Board to determine whether Grace's petition under Docket 707 is an application on behalf of Panagra, but the Court at the same time seems to restrict the Board's inquiry to the question whether Pan American has improperly prevented Panagra from filing an application. We submit that this action of the Court is erroneous on both counts.

In the first place, the Board has already found that no application has been filed on behalf of Panagra. At least twice in its opinion (Tr. 11, 20) the Board referred to the "absence of an application from Panagra." This plainly constitutes a finding that no application had been filed. The findings of fact of an administrative agency are conclusive. *Helvering* v. *Kehoe*, 309 U. S. 277, 279 (1940); *National Labor Relations Board* v. *Medo Photo Supply Corp.*, 135 F. (2d) 279, 281 (C. C. A. 2d, 1943). Legal interpretations by an administrative agency "will not be disturbed except for weighty reasons." *Brewster* v. *Gage*, 280 U. S. 327, 336 (1930).

Far from having "weighty reasons" for rejecting the Board's finding that no application on behalf of Panagra was pending, and far from discovering "no evidence" to support that finding, the Court's opinion apparently *assumes* that the Board did not even consider the matter, and seeks to restrict the Board's discretion in deciding the question,

The Court apparently feels that it was the Board's duty to consider whether the petition under Docket 707 was an "application". Yet the Court *assumes* that the Board did not perform that duty when it made its finding that no application had been filed. The contrary assumption is required. It is the established rule that an administrative agency is presumed to have performed its duty in the absence of proof to the contrary. There is no proof to the contrary in this case.

The plain fact is that Grace's petition under Docket 707 is not an application. The Board's regulations (Section 238.1), adopted pursuant to express authorization under Section 401(b) of the Act, make many requirements concerning "applications for certificates of public convenience and necessity *or amendments thereof.*" Those requirements are not met by the petition under Docket 707. For example, the petition did not name any "applicant," identify any route applied for, specify the types of service to be performed, set forth a map of the routes proposed, or state the type of aircraft to be used, etc.

We are at a complete loss to understand how the Court could make any determination whatever concerning the nature of Docket 707. Grace's petition is not a part of the record, although Grace improperly quoted it in an appendix to its supplemental brief. Apparently the Court jumped to the conclusion that the petition under Docket 707 could be an application merely because it referred to "public convenience and necessity." This is obviously not true, as any kind of document (motion, brief, etc.) filed with the Board might refer to "public convenience and necessity."

The Board is in the best position to construe its own rules, and it properly held that no application had been filed. This Court has no power to order the Board to disregard the rules authorized by the Act, or to require the

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Board to consider entirely different factors in determining what is an application.

A footnote to the Court's opinion states that:

> "The Board tells us that in other cases it has treated consents by carriers, filed in s. 401(h) proceedings, as voluntary petitions for extensions under §401(d). We think that a correct conclusion."

We have found nothing in the record or the briefs to support such a statement, and we know of no instance in which the Board has held that a mere "consent" can be considered an application in the absence of an actual application broad enough to cover the extension involved.

In passing, it may be noted that in the hearing under Docket 779 Grace was given the status of an intervenor, and thus had the right to cross-examine the witnesses representing Panagra. If it had been considered an applicant, it would not have had that right—certainly a very substantial one. Hence, the record in Docket 779 would be seriously prejudicial to other parties if it were now to be used to decide a supposed "application" filed by Grace. Procedural defects of this nature are essentially prejudicial. *Edwards* v. *United States*, 312 U. S. 473, 482 (1941).

Even assuming that the petition under Docket 707 could be considered an application, Grace has no right to, and the Court has no power to compel, the inclusion of said petition in Docket 779. The Court's decision that Docket 707, as an application, must be considered by the Board under Docket 779 appears to be based on the misapprehension that Grace otherwise would be improperly denied a hearing because other applications for service in the same area might, in the meantime, be granted and might foreclose the proposal for extension of Panagra. There are many fallacies in that theory.

There is nothing whatever in the record of this case indicating that other applications might be granted before Grace could obtain decision on Docket 707, and there is certainly nothing in the record to suggest that any such applications would preclude the extension of Panagra as desired by Grace. Grace sought in its supplemental brief to bring to the Court's attention certain matters *not in the record*, and the Court has quoted such material in a footnote to its opinion. (Even this material would not support the theory suggested in the Court's opinion.)

It is well established that a reviewing court cannot rely upon evidence not in the record. *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 72 (1936); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. (2d) 263, 267 (C. C. A. 8th, 1943). In *National Labor Relations Board* v. *Newport News Co.*, 308 U. S. 241, 249-250 (1939), the Court said:

> "The court below, in its opinion, states it was advised in a brief after the hearing in that court, that the plan had been amended by striking out the provisions in question. It concluded, therefore, that their previous existence is immaterial. The statute expressly deprives the reviewing court of power to consider facts thus brought to its attention. The case must be heard on the record as certified by the Board."

Since there is nothing in the record to support the conclusion that any rights of Grace or Panagra might be prejudiced by delay in hearing of Grace's petition under Docket 707, there is no support for the Court's reliance on *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. (No. 65, December 3, 1945). That case involved a situation where *the administrative agency itself*

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had held that two applications were *mutually exclusive*. The Court held that, under such circumstances, the granting of one application without a hearing effectively denied the second applicant of a hearing.

No such facts exist in this record, and the Court's decision appears to be based solely on speculation with respect to this point. The Court's further remarks on the subject amount to a finding that, merely because a record has already been made in Docket 779, Grace is entitled to a preferred hearing even though in order to grant such a preference the Board must rule contrary to the position of Grace and all parties and hold that Docket 707 amounted to an application on behalf of Panagra which must be considered in Docket 779. Such a position is completely negatived by the decision in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940), where, although a record had been made in a prior hearing, the Court held that the Commission could not be required to decide the case on that record but had full freedom to require the making of a new record. The Court there said:

> "• • • the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interests."

The Court's solicitude for Grace is entirely out of keeping with the history of this case. Grace has at all times

taken the position that the proceeding under Docket 779 must be carried on and decided entirely apart from other proceedings involving service in the same area. The Court has noted in its opinion that Eastern sought consolidation of its application involving Caribbean service with Docket 779. The Court did not note, though the record shows, that Grace vigorously opposed the consolidation and took the position that the two matters were not related in any way. See Grace's "Motion of Opposition" dated September 13, 1943 and filed September 14, 1943 in Docket 779. Grace then said, among other things:

> "The issue is rather whether the Board may hold a hearing to consider whether a great international airline, Panagra, with an international network of almost 9000 miles connecting eight countries should run a direct through service to its natural terminal in the United States, which is the origin or destination of an important portion of its traffic * * *
>
> "This is the basic issue in Docket No. 779. It is a question which must be determined without regard to the applications of Eastern or any other airline * * * Dockets 779 and 782 present no such identity of issues which existed in the cases cited by Eastern in its petition" (page 2).
>
> "Eastern's application and the Board's proceeding in Docket 779 do not propose 'substantially the same type of service.' A connecting service provided by Eastern cannot possibly constitute an extension of Panagra's route to a United States terminal. To permit consolidation would not only 'enlarge the scope of this proceeding'; it would by the introduction of an entirely new and wholly unrelated issue entirely change the nature of the proceeding" (page 3).

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"There is no unfairness or any unique favor involved in the Board's deciding on its merits the only question involved in this proceeding" (page 4).

"In view of the issue in Docket 779 as above stated the time of the filing of Eastern's application for a route to the Canal Zone is of no importance. Likewise the question of competition does not control whether the public interest requires that Panagra extend its route to a United States terminal. Whether, quite apart from such extension further competition should be provided in this area is a separate question" (page 6).

It would be a most serious miscarriage of justice if Grace, which originally demanded preferred and separate hearing and denied that Docket 779 had any relation to other proposals for service in the Caribbean, were now to be given a far greater preference by having its petition under Docket 707 considered an application, and decided in a proceeding in advance of other applications, on the theory, now advanced for the first time, that otherwise the applications which Grace originally scorned as unrelated might foreclose Grace's proposal.

Grace has had every opportunity to obtain hearing on Docket 707. It could have demanded consolidation with Docket 779. It could have demanded consolidation with other applications in proceedings involving the same area. It did not do so. Instead it deliberately relied on the proceeding started on the Board's own motion under Docket 779. We submit that it is not a part of a reviewing court's function to give parties a second or third guess as to the best procedural course to take. We cannot believe that the Court will wish to embark on a program of ordering consolidated or preferred hearings for applicants who have

deliberately kept their applications out of consolidated proceedings. If the Court were to do such a thing there are dozens of other cases where the Court's similar action would be equally appropriate.

As the Court pointed out in the *Pottsville* case, *supra* (309 U. S. 134, 146):

> "But courts are not charged with general guardianship against all potential mischief in the contemplated tasks of government * * * Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."

To this statement may be added the remark that too much direction by courts of administrative agencies would lead to disruption of administrative proceedings and the deprivation of substantial rights. In the present case, the Court's mandate would require the Board to rule on Grace's charges against Pan American, while depriving Pan American of the right to prove its charges against Grace.

The Court seems to have assumed that the only issues under Section 411 of the Act are those raised by Grace, charging Pan American with improper practices relative to Panagra. It must be remembered that Pan American has filed equally serious charges against Grace. There are indications in the record that Pan American will be able to substantiate its charges if given an opportunity. As the Board's procedure is now set up, all these charges and counter-charges will be aired and decided at the same time under Docket 744. Obviously that is the proper procedure. The Board can then rule whether Grace or Pan American (or both) should surrender control of Panagra. This is precisely the procedure urged by Grace in its statement, quoted in the Board's opinion, that "If the Board wishes to pursue

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this subject further, it should grant the petition of Pan American for an investigation under Section 415 of the Civil Aeronautics Act, just as it should institute proceedings under Section 411 as requested by Grace in Docket No. 744."

It would completely demoralize this orderly procedure if the Court were now to compel the Board to decide Grace's charges as a part of Docket 779, while deferring Pan American's charges for a later hearing. It would further deprive Pan American of the hearing to which it is entitled. We respectfully submit that the Court should not, by its mandate, prevent the Board from carrying out its duties properly or disable it from achieving substantial justice.

Finally, we submit that Grace has no standing to file an application on behalf of Panagra. The *American Power and Light Co.* case (65 Sup. Ct. 1254 [U. S. 1945]), cited by the Court, does not establish any standing on the part of Grace. That case did not hold that a mere charge by a stockholder of fraud and illegality on the part of management would be sufficient to permit the stockholder to maintain an appeal. So far as the facts of that case indicate the holding, a shareholder must still prove that the administrative order will be positively harmful to him before he has the right to appeal. Grace could not prove or even claim any harm whatsoever from the failure of the Board to extend Panagra's route. Such failure merely leaves Grace and Panagra where they were. We submit that the Supreme Court did not intend in the *American Power and Light Co.* case to open the door to indiscriminate prosecution of applications for expanded operations by shareholders merely on the allegation that the management had wrongfully refused to apply.

WHEREFORE, Eastern Air Lines, Inc. prays that a rehearing be granted with respect to the decision of this Court, dated January 28, 1946 in this case, and upon such rehearing that the order of the Civil Aeronautics Board under review in this case be affirmed.

Respectfully submitted,

GAMBRELL & WHITE,
Attorneys for Eastern Air Lines, Inc.

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
Of Counsel.

New York, N. Y.
February 11, 1946.

Certificate of Counsel

I, W. GLEN HARLAN, Attorney and Counsel for Eastern Air Lines, Inc., Petitioner, hereby certify that the above petition for rehearing is presented in good faith and not for delay.

Dated, February 11, 1946.

W. GLEN HARLAN
Attorney for Petitioner

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[fol. 115] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

W. R. GRACE & Co., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., et al., Respondents.

[fol. 116] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 92

(Petitions for Rehearing Submitted February 11, 1946. Decided February 21, 1946.)

Docket No. 19520

W. R. GRACE & Co., Petitioner,

vs.

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., et al., Respondents.

Before L. Hand, Swan and Frank, Circuit Judges

ON PETITIONS FOR REHEARING

Henry J. Friendly (James P. Kranz, Jr., and John P. Apicella, of counsel) for Pan American Airways Corporation; Gambrell & White (E. Smythe Gambrell, W. Glen Harlan and Harold L. Russell, of counsel) for Eastern Air Lines, Inc.

[fol. 117] PER CURIAM:

Pan American and Eastern have filed petitions for rehearing which we deny but which make desirable some additional comments.

1. The petitions complain that we have held that the Board may and should consider a "private dispute between

stockholders" relating solely to the question "whether one stockholder has acted prejudicially to the corporate welfare." That complaint overlooks this basic assumption of our opinion: As the Board itself recognized in the recitals of its order of September 10, 1942, the declared policy of Congress set forth in § 2 of the Act not only makes paramount the "public interest" but also explicitly includes as an important factor, vitally affecting the public interest, "competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." If, as that order of the Board indicates, the facts brought out at a hearing should show that the public interest required competition between Panagra and Pan American's wholly owned subsidiary, and that Pan American was improperly using negative control of Panagra to interfere with such competition, then the Board might find it necessary to take steps, authorized by that Act, to prevent such interference as prejudicial, not to Panagra's "corporate welfare," but to the public interest. Of course nothing we have said is to be understood as precluding the Board from considering and deciding, in this or any other proceeding, whether Grace is violating § 408. Nor are we intimating that, should the Board find that Grace is violating § 408 and that Pan American is also improperly using its stock interest in Panagra, the Board may not exercise its statutory powers to rectify the situa- [fol. 118] tion in any way it deems wise.[1] It should go without saying that (although the record is already voluminous and seems to cover all these issues) the Board should give all parties the opportunity to offer additional, relevant evidence unless the Board, in the exercise of sound discretion, rules that it is needlessly cumulative.

2. Pan American, in its rehearing petition, concedes that "the overall purpose of the statute is the advancement of the public interest by the promotion of civil air service." That purpose, permeating this case, both before the Board and in this court, serves to dispose of the contention that in our decision we have exceeded our powers of review.

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[1] We do not have (as Eastern somewhat recklessly suggests) any "solicitude for Grace."

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Grace, before the Board, objected to the dismissal of the proceeding for want of jurisdiction in the Board; in its petition for review, Grace prayed "for such other relief as to the court may seem just and proper in the circumstances." With increasing emphasis, the Supreme Court has admonished us that, in court review of such administrative orders as this now before us, the public interest looms large.[3] Accordingly, since this is not mere private [fol. 119] litigation, overly nice scrutiny of the pleadings and undue stress on alleged stoppels [3a] have no place here.[3a]

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[3] *F. C. C.* v. *Sanders Radio Station*, 309 U. S. 470; *Scripps-Howard Radio* v. *F. C. C.*, 316 U. S. 4; *F. C. C.* v. *N. B. C.*, 319 U. S. 239, 247; *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. —.

In the *Scripps-Howard Radio* case, the Court said (pp. 14-15): "But these private litigants have standing only as representatives of the public interest. *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 477. Compare *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 362-63. That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights • • • Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes."

See *Associated Industries* v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2) for discussion of the development of this doctrine; there (at 704) we suggested that those who come within the class of persons who may seek review, under review provisions like that here, may be considered "private Attorney Generals."

[3a] Grace, before the Board, objected to consideration in this proceeding of its petition No. 744 with respect to § 411. We do not (as Eastern erroneously suggests) instruct the Board to consider § 411, although it may do so if it wishes and although it may be that, in considering Grace's petition No. 707, it may be necessary to deal with much the same issues as would arise under § 411.

It is to be noted that Pan American before the Board referred to "Grace's complaints in Dockets No. 707 and 744, which form the background of this proceeding."

[3a] Cf. Mercoid Corp. v. Mid-Continent Co., 320 U. S. 661, 670.

Eastern argues that *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, shows that we have illegitimately intruded on the Board's discretion as to the order in which it chooses to consider matters pending before it. But the Supreme Court rejected that same suggestion in *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. —, as the dissenting opinion in that case discloses. The unmistakable fact is that, of recent years, there has been a steady development in Supreme Court decisions of the doctrine that those seeking review of the orders of administrative agencies, under review provisions like § 1006 of this Act, are primarily vindicating the public, not a private, interest.[4] It is our duty to follow the lines laid down by that Court, and we have done so here according to our lights.

3. It is urged that in our discussion of *American Power & Light Co.* v. *Securities & Exchange Commision*, 325 U. S. 385, we neglected the fact that it turned on the extensive powers and duties of the S. E. C. under the Public Utility Holding Company Act which include protection of the interests of investors and therefore authorize administrative scrutiny of the relations between stockholders and their corporations. But that contention disregards the numer- [fol. 120] ous provisions of the Civil Aeronautics Act directing and authorizing the Board, in safeguarding the public interest and in carrying out the declared policy of the Act, to investigate, supervise, and do the needful, with respect to the management and control of air carriers.[5] In the light of those provisions, we reject Pan American's argument that the Board lacks all "power to take the management of a corporation out of the hands of its directors." It was with those provisions in mind that we said that exploration of the issues of alleged "fraud" or "illegality" in the management and control of Panagra demand the Board's "specialized acquaintance with commercial aviation and its ramifications." *Pittsburg, etc. R. Co.* v. *United States*, 281 U. S. 479, involved nothing like the public interest patently here involved; moreover, that case was decided before the recent doctrinal development above noted. We see nothing in *Schenley Distillers Corp.* v. *United States*, — U. S. — (January 2, 1946) to induce a different conclusion.

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[4] See cases cited, *supra*, note 2.

[5] See §§ 407, 408, 409, 411, 412, 413, 415; *cf.* § 1 (a).

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4. Objection is made to the fact that in a footnote we referred to the Latin American Proceeding (Docket No. 525) because this is a matter not in the record before us. The Board in one of its briefs called our attention to the existence and nature of that proceeding. Whether, since it relates to subsequent happenings in the Board affecting the case here, we may not properly consider it is not entirely clear.[6] But we did not, in any way, rest our decision thereon, using it merely to illustrate the obvious point that the Board's long delay in passing on Grace's petition filed December 16, 1941, might, through intervening circumstances, render the Board impotent—should it later take [fol. 121] up that petition and decide it in favor of Grace—to do that which would be in the public interest.

5. We were in error in saying in a note to our previous opinion that the Board had told us that in other cases it had treated consents, filed in § 401 (h) proceedings, as voluntary petitions for extensions under § 401 (d). But we adhere to the view that a consent by a carrier to a 401 (h) extension proceeding begun by the Board is the legal equivalent of a petition for the same extension initiated by the carrier.

6. To avoid misunderstanding, we repeat that we are not prejudging any of the issues of fact. We have not examined the record as to the merits. That is the Board's function.

Petitioners for rehearing denied.

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[6] *Cf. Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 466; *Patterson* v. *Alabama*, 294 U. S .600, 607.

[fol. 122] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 21st day of February, one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

W. R. GRACE & Co., Petitioner,

v.

CIVIL AERONAUTICS BOARD, et al., Respondents

Petitions for a rehearing having been filed herein by counsel for the respondents, Pan American Airways Corporation and Eastern Air Lines, Inc.,

Upon consideration thereof, it is

Ordered that said petitions be and hereby are denied.

Alexander M. Bell, Clerk.

[fol. 123] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. W. R. Grace & Co., v. Civil Aeronautics Board, et al. Order. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 21, 1946. Alexander M. Bell, Clerk.

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[fol. 124] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 25th day of February, One thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

No. 19520

W. R. GRACE & Co., Petitioner,

against

CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORPORATION, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., Taca, S. A., Department of Justice of the United States of America, and Pan American-Grace Airways, Inc., Respondents

This cause came on to be heard on the petition of W. R. Grace & Co. for review of three orders of the Civil Aeronautics Board, dated December 17, 1943, May 24, 1944 and August 5, 1944, and on the transcript of the record from the Civil Aeronautics Board, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decree-, on motion of Cahill, Gordon, Zachry & Reindel, Attorneys for Petitioner, W. R. Grace & Co., that the said orders of the Civil Aeronautics Board, dated December 17, 1943, May 24, 1944 and August 5, 1944 be and they are hereby set aside and that the proceedings [fol. 125] designated as Civil Aeronautics Board Docket 779 be and it hereby is remanded to the Civil Aeronautics Board for further proceedings in conformity with the opinion of this Court, dated January 28, 1946.

(Sgd.) Learned Hand, United States Circuit Judge; Thomas W. Swan, United States Circuit Judge; Jerome N. Frank, United States Circuit Judge.

Filed February 25, 1946.

[fol. 126] [Endorsed:] No. 19520. In the United States Court of Appeals for the Second Circuit. W. R. Grace &

Co., Petitioner, against Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., Taca, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents. Notice and Proposed Counter-Order. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 25, 1946. Alexander M. Bell, Clerk.

[fol. 127] UNITED STATES OF AMERICA,
Southern District of New York:

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from A. 1 to 14; B. 1 to 149; C. 1 to 39; D. 1 to 71; E. I to XIII; F. 14 to 18; G. 1 to 42; H. I to XII; I. 699 to 733; J. 1 to 18; K. 1 to 23; and L. 1 to 11; inclusive, contain a true and complete transcript of the printed parts of the record and proceedings had in said Court, in the case of W. R. Grace & Co., Petitioner, v. Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., Eastern Air Lines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., Taca, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 17th day of April, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventieth.

Alexander M. Bell, Clerk. (Seal.)

[fol. 128] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1945

No. ——

PAN AMERICAN AIRWAYS CORPORATION, and PAN AMERICAN AIRWAYS, INC., Petitioners,

vs.

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, EASTERN AIR LINES, INC., National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents.

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, as follows:

1. The printed record for use in the Supreme Court of the United States on petition for certiorari in the above cause shall consist of the appendices to the briefs and to the supplemental briefs of the petitioner Pan American Airways Corporation and respondents W. R. Grace & Co., Eastern Air Lines and the Civil Aeronautics Board filed in the United States Circuit Court of Appeals for the Second Circuit in Docket No. 19520 together with the proceedings in the Circuit Court of Appeals which shall be certified by the Clerk of the United States Circuit Court of Appeals for the Second Circuit.

2. Since all of the respondents have heretofore received copies of the appendices to the briefs and supplemental briefs filed in the Circuit Court of Appeals for the Second Circuit, all of the respondents hereby expressly waive serv-[fol. 129] ice on their respective counsel, as provided for by paragraph 3 of Rule XXXVIII of the Supreme Court of the United States, of a copy of such portion of the printed record to be filed in the Supreme Court of the United States in connection with the aforesaid petition for certiorari which consists of the said appendices.

3. The petitioners will cause the Clerk of the United States Circuit Court of Appeals for the Second Circuit to

certify and file with the Clerk of this Court the entire transcript of the record in original form as filed by the Civil Aeronautics Board in the Circuit Court of Appeals for the Second Circuit in Docket No. 19520, and if said Clerk so requires the parties hereto will consent to the entry of an order by this Court or by the United States Circuit Court of Appeals for the Second Circuit directing that said entire transcript of the record be certified and filed with this Court.

4. Petitioners will file with the Clerk of this Court, as an appendix to their petition and brief, one copy of (a) the letters from the Circuit Court of Appeals for the Second Circuit to parties dated November 29, 1945 and December 3, 1945, (b) the letters from certain parties to that Court dated December 12 and December 17, 1945, and (c) all of the briefs and supplemental briefs filed by the parties in the Circuit Court of Appeals for the Second Circuit in Docket No. 19520; and all of the respondents hereby expressly waive service on their respective counsel as provided for by paragraph 3 of Rule XXXVIII of this Court, of a copy of this appendix.

5. If any of the respondents named above file petitions for certiorari in their own behalf, the record, as certified by the Clerk of the United States Circuit Court of Appeals [fol. 130] for the Second Circuit pursuant to paragraphs 1 and 3 hereof, shall be entitled in each of such causes.

6. Any of the parties hereto may refer in the petitions and briefs to any portions of the certified transcript of record which are not included in the printed record to be filed in accordance with this stipulation, and to any portions of the appendix referred to in paragraph 4 hereof.

7. In the event that certiorari is granted, the printed record shall consist of the printed record prepared for use on petition for certiorari as described in paragraph 1 hereof and such portions of the entire transcript of record certified by the Clerk of the United States Circuit Court of Appeals for the Second Circuit as the respective parties may designate, and petitioners will print, or otherwise reproduce in a form satisfactory to this Court, as an appendix to their brief, such portions of the appendix referred to in para-

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graph 4 hereof as they or the other parties hereto may designate.

Dated, April 10, 1946.

Henry J. Friendly, Counsel for Pan American Airways Corporation and Pan American Airways, Inc.; Fred J. Knaur, Counsel for W. R. Grace & Co.; J. Howard McGrath, Solicitor General of the United States for and on behalf of the Civil Aeronautics Board and the Department of Justice of the United States of America; E. Smythe Gambrell, Counsel for Eastern Air Lines; Wm. I. Denning, Counsel for National Airlines, Inc.; W. Clifton Stone, Counsel for Chicago & Southern Air Lines, [fol. 131] Inc.; (Copy illegible), Counsel for TACA, S. A.; W. F. Creswell, H. Preston Morris, Counsel for Pan American-Grace Airways, Inc.

[fol. 132] [Endorsed:] In the Supreme Court of the United States. October Term, 1945. No. —. Pan American Airways Corporation, and Pan American Airways, Inc., Petitioners, vs. W. R. Grace & Co., Civil Aeronautics Board, Eastern Airlines, Inc., National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A., Department of Justice of the United States of America and Pan American-Grace Airways, Inc., Respondents. Stipulation.

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MAY 20 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 4

PAN AMERICAN AIRWAYS CORPORATION and PAN AMERICAN AIRWAYS, INC.,

Petitioners,

against

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HENRY J. FRIENDLY,
Attorney for Petitioners.

JAMES P. KRANZ, JR.,
Of Counsel.

May 20, 1946.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.



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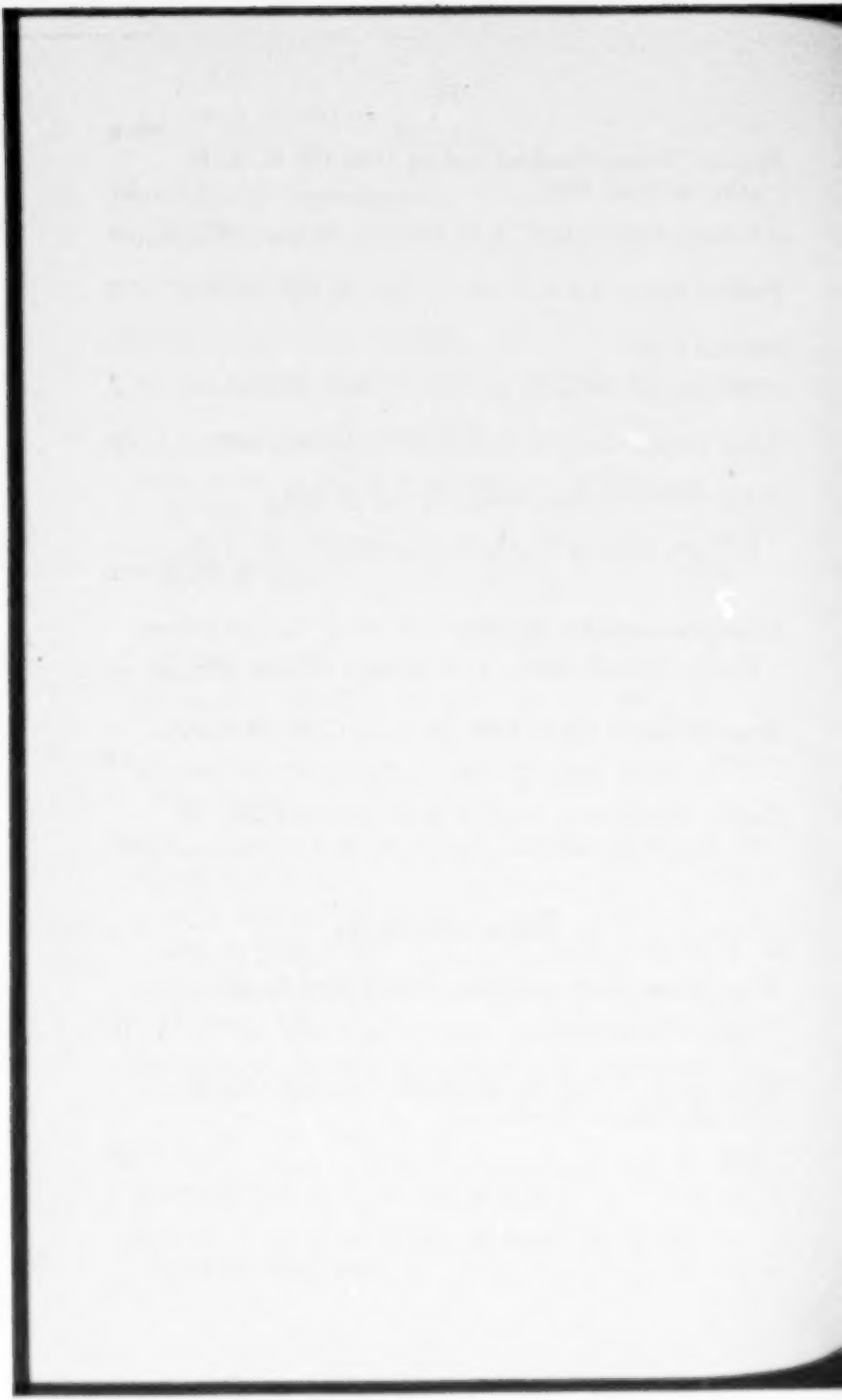
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Supreme Court of the United States

OCTOBER TERM, 1945.

No. .

PAN AMERICAN AIRWAYS CORPORATION and PAN AMERICAN AIRWAYS, INC.,

Petitioners,

against

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To The Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pan American Airways Corporation and Pan American Airways, Inc. pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review the judgment and decree of that Court (R. 433)* entered on February 25, 1946 in a cause entitled *"W. R. Grace & Co., Petitioner* v. *Civil Aeronautics Board,*

---

* Page references to the printed record on certiorari are indicated "R. .....". Page references to the record before the Civil Aeronautics Board, filed with the Clerk of this Court in original form, are indicated "B. R. ....."; page references to Appendix II to the Petition and Brief filed with the Clerk of this Court, are indicated "App. II, ...".

Pan American Airways Corporation, Pan American Airways, Inc., et al., Respondents." By this judgment and decree the Court of Appeals set aside orders of the Civil Aeronautics Board dismissing as beyond the Board's jurisdiction a proceeding (begun by the Board on its own initiative) to compel an extension of the route of Pan American-Grace Airways, Inc., and remanded the cause for the Board to consider whether W. R. Grace & Co., one of the stockholders of Pan American-Grace, had the right to "speak for" Pan American-Grace and "by so doing to make the application a voluntary one" (R. 370).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1006(f) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. § 646(f), 52 Stat. 1025, 54 Stat. 1235)* and Section 240 of the Judicial Code, as amended (28 U. S. C. § 347, 43 Stat. 938). The date of the judgment and decree to be reviewed is February 25, 1946 (R. 433).

Statement of the Matter Involved.

(1) The Background and Nature of the Controversy.

Pan American-Grace Airways, Inc. (sometimes hereinafter referred to as "Pan American-Grace" or as "Panagra") is an air carrier holding a certificate of public convenience and necessity under the Civil Aeronautics Act for operations in South America between the Canal Zone and Buenos Aires. From the outset half of its capital stock has been owned by Pan American Airways Corporation, one of the petitioners herein, and the other half by W. R. Grace & Co. (sometimes hereinafter referred to as "Grace"),

* Pertinent statutory provisions are set forth in Appendix I, *infra*, pp. I-VIII.

one of the respondents, and each of these companies has been represented by an equal number of directors on its board.

The circumstances under which Pan American-Grace was formed were as follows: Late in 1927 and early in 1928, Pan American Airways, Inc., the wholly owned operating subsidiary of Pan American Airways Corporation, was creating air transportation in Latin America under the American flag. On July 13, 1928, it was awarded the United States Foreign Airmail Contract between the continental United States and the Canal Zone for a period of ten years (R. 261). Even prior to this award, it was far advanced in plans for operations on the West Coast of South America south of the Canal. It had obtained an option on an operating concession and an airmail contract in Peru and was engaged in negotiations for similar concessions and contracts in Colombia and Ecuador (R. 258-60; B. R. 1874-78, 7060-61).

As a result of conversations during August, 1928, Pan American extended to Grace an option to participate in Pan American's contemplated operations from the Canal down the west coast of South America. The terms of the understanding were stated in a letter dated August 31, 1928 which provided that the two companies would "associate for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chile." A corporation with a capital stock of $50,000, to be owned equally by each of the two companies, was to be promptly formed for the purpose of engaging in operations in Peru under the concession on which Pan American had an option. If Pan American determined that it was "advisable to bid on a contract for carrying the mails between the

Panama Canal and Valparaiso," Grace was to "have a reasonable time after a study of the estimated costs of such operation to determine what interest, if any, we will take in the company making the bid in addition to our initial investment of $25,000, such interest not to exceed, however, more than 50% of the total capitalization." It was further stipulated that if the through service was inaugurated, Pan American was to "have charge of the operation of the service from the Canal to Valparaiso" while the Grace "houses on the West Coast of South America will be the agents of the company" (R. 270-71).

Pursuant to this understanding Pan American-Grace was organized under the laws of Delaware early in 1929. It became the successful bidder on Foreign Air Mail Contract No. 9 (R. 272-79), for air mail service from the Canal Zone to Santiago, Chile, with a right in the Postmaster General to require extension of the service to Buenos Aires, Argentina and Montevideo, Uruguay. When, under the Civil Aeronautics Act of 1938, a regime of certificates of convenience and necessity superseded the former mail contracts, this 1929 contract became the basis for the award to Pan American-Grace of a certificate of public convenience and necessity under the "Grandfather Clause" of the Civil Aeronautics Act* for service between the Canal Zone and various points in western Colombia, Ecuador, Peru, Chile, Bolivia and Argentina.

The present controversy begins with a demand advanced by Grace in 1938 that the scope of Pan American-Grace's operations should be expanded northward so as to parallel the route of Pan American Airways between the Canal Zone and the continental United States (B. R. 1744-47,

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* §401(e), 49 U. S. C. §481(e); 52 Stat. 988, 54 Stat. 1235.

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1980-1). After some months of discussion, the parties, on February 14, 1939, entered into a settlement agreement to be in force for a period of five years and thereafter until terminated on six months' written notice—which has never been given.*

Less than two years after making this settlement agreement, Grace again raised the extension issue. Pan American offered arbitration pursuant to the terms of the agreement, but this offer was declined by Grace, as were all subsequent offers (R. 257, 282-86).

(2) The Proceedings Before the Civil Aeronautics Board.

Instead of going to arbitration or resorting to the courts, Grace filed with the Civil Aeronautics Board in December, 1941, some ten days after Pearl Harbor, a "complaint" asking that the Board exercise its alleged power to amend Pan American-Grace's certificate under Section 401(h)** of the Act in such manner as to require Pan American-Grace to extend its route to the United States. This "complaint" was designated by the Board as its Docket 707 (R. 314-27).

On April 27, 1942, Grace filed with the Board a letter and "statement of facts," praying that the Board require

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* This settlement agreement provided (1) that Pan American should promptly meet Grace's complaints with respect to the adequacy of the connecting service between the continental United States and the Canal; (2) that in the event of subsequent failure of Pan American to maintain an adequate connecting service, Pan American would take appropriate steps to permit Pan American-Grace to apply for an extension north from the Canal; (3) that a Grace director was to be elected President of Pan American-Grace but that technical, traffic and other services were to be rendered to Pan American-Grace by Pan American Airways, Inc. as theretofore; and (4) that any dispute as to any phase of the plan was to be settled by arbitration (R. 280-81).

** 49 U. S. C. §481(h), 52 Stat. 989, 54 Stat. 1235.

Pan American to cease and desist from opposing the filing of an extension application by Pan American-Grace and to divest itself of its stock in Pan American-Grace to such extent as might be necessary to terminate its negative control of Pan American-Grace, in accordance with Section 411 of the Civil Aeronautics Act (49 U. S. C. §491, 52 Stat. 1003, 54 Stat. 1235) and Sections 7 and 11 of the Clayton Act (15 U. S. C. §§18, 21, 38 Stat. 731, 734, 52 Stat. 1028, 54 Stat. 1235). The Board designated this as Docket 744 (R. 327-42). Pan American filed an answer and cross-petition in Docket 744 requesting the Board to find that Grace had acquired its stock in Pan American-Grace in violation of Section 7 of the Clayton Act and to issue an appropriate complaint against Grace under Section 11 of that Act.

The Board took no action in either of these dockets. Instead, by its order of September 10, 1942, the Board instituted an entirely new proceeding, Docket 779 (R. 50-52), the purpose of which was

> "to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States * * * ; and (b) in the event a terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States; * * * "

Pan American-Grace, Grace and Pan American Airways, Inc. were made parties to this proceeding which was assigned for public hearing. Pan American Airways Corporation, Eastern Air Lines, Inc. and others were later permitted to intervene (B. R. 112-14, 193-95).

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At the opening of the hearing in Docket 779, Pan American moved to dismiss the proceeding for want of jurisdiction on the part of the Board to compel the proposed new operation (R. 56-65). The Board denied the motion without prejudice to renewal at the close of the hearing (B. R. 328). Thereupon, at the close of the hearing, Pan American renewed its motion to dismiss (R. 110). After brief and argument, the Board handed down its opinion and order dismissing the proceeding for want of jurisdiction to order the proposed extension (R. 31-47). The Board held that, even assuming that its power under Section 401(h) of the Civil Aeronautics Act of 1938 to order airline extension was not as narrow as held with respect to the Interstate Commerce Commission in *Interstate Commerce Commission* v. *Oregon-Washington RR. and Navigation Co.*, 288 U. S. 14 (1933), but was as broad as indicated in the dissenting opinion of Justices Cardozo, Brandeis and Stone, the extension here under consideration exceeded the scope of that power.

A petition by Grace for reconsideration was denied by the Board (R. 48, 84-106).

(3) The Proceedings in the Circuit Court of Appeals.

Grace filed a petition with the Circuit Court of Appeals for the Second Circuit for review of the orders of the Board (R. 164-176). The Board moved to dismiss Grace's petition for review or, in the alternative, for affirmance forthwith of the orders complained of (R. 1-19), on the grounds that Grace did not have the substantial interest in the orders required to give it status to obtain review under Section 1006(a)* of the Civil Aeronautics Act, and that in any event

* 49 U. S. C. §646(a); 52 Stat. 1024, 54 Stat. 1235.

the orders were not subject to review. Pan American joined in this motion (R. 20-22). The court denied the motion (R. 23). This question was resubmitted to the court at the argument on the merits (App. II, 139, 179-94, 228-30, 284-89).

Grace's contentions on the merits were (1) that the Board had erred as a matter of law in deciding that it lacked authority under Section 401(h) of the Act to compel the extension proposed, and (2) that Grace had been denied a fair hearing with respect to that question. Either expressly or by implication, the court decided both these issues in a manner *favorable* to the position taken by the Board and by the present petitioners and *adversely* to the position taken by Grace (R. 368-74). The court made no comment on Grace's claim of denial of a fair hearing, and it conceded the correctness of the Board's decision dismissing the proceeding if the case was to be regarded as it always had been—namely, as a compulsory extension proceeding under Section 401(h) (R. 368-9).

However, in spite of all this, the court, in an opinion by Judge Frank, decided *against* the present petitioners and the Board and in *favor* of Grace. It did this on the basis of a theory never advanced by any of the parties in the entire course of the proceeding. This was that the Board had power, which the Board *must* exercise, to determine in the compulsory extension proceeding whether Pan American had so exercised its voting power in Pan American-Grace as to be guilty of "illegality and fraud"; that, if the Board should so find, the Board should then consider that Grace should be deemed to have filed an effective "consent" to the extension on behalf of Pan American-Grace; and that, on the analogy of a stockholder's suit, this would permit the Board to treat the *compulsory* extension proceeding under

Section 401(h) as a *voluntary* application by Pan American-Grace for a certificate under Section 401(d) (49 U. S. C. §481(d); 52 Stat. 987, 54 Stat. 1235). (R. 368-74).*

The Questions Presented.

This case presents the following important questions with respect to the jurisdiction of the Civil Aeronautics Board and of review of its orders by the Circuit Courts of Appeal under the Civil Aeronautics Act of 1938,—a statute never heretofore construed by this Court.

(1) In a compulsory extension proceeding where the Civil Aeronautics Board finds itself without power to compel an extension on the admittedly correct ground that the extension was "outside those additional burdens which a

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* The Board's order of dismissal was the principal order sought to be reviewed by Grace in the Circuit Court of Appeals and is the only one to which the court's opinion was directed. However, the judgment and decree also sets aside two other orders. These were (1) an order of Dec. 17, 1943 (R. 49) denying a motion by Grace that consideration of Pan American's motion to dismiss be postponed until a consideration of the case on the merits after an Examiner's report (R. 66-9), and (2) an order of August 5, 1944 (R. 48) denying Grace's petition for rehearing and reconsideration of the order of May 24, 1944 (R. 84-106). A merely procedural order such as the order of December 17, 1943 is not reviewable. Civil Aeronautics Act, §1001, 49 U. S. C. §641, 52 Stat. 1017, 54 Stat. 1235; *United States* v. *Ill. Cent. R. R. Co.*, 244 U. S. 82 (1917); *F. P. C.* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938); *Jones* v. *S. E. C.*, 79 F (2d) 617 (C. C. A. 2d, 1935), cert. den. 297 U. S. 705 (1936); *Guaranty Underwriters, Inc.* v. *S. E. C.*, 131 F. (2d) 370 (C. C. A. 5th, 1942); *Perkins* v. *Endicott Johnson*, 128 F. (2d) 208, 213 (C. C. A. 2d, 1942); aff'd 317 U. S. 501 (1943). The only ground urged by Grace for reversal of the order of August 5, 1944, denying its petition for rehearing, over and above those previously urged in connection with the order of dismissal, was a claim that the order of dismissal had been without according Grace a fair hearing. This ground was not passed upon by the Court of Appeals. Accordingly, this Petition and Brief will concern themselves only with the reversal of the Board's order of May 24, 1944 dismissing the proceeding.

licensee impliedly accepts as part of the control to which his rights are in any event subject" (R. 369-70), does the Board have jurisdiction to investigate whether the failure of the air carrier to apply for the extension was due to "illegality" or "fraud" on the part of one of the stockholders, and, if the Board so finds, to assume the powers of a court of equity and treat the case as if another stockholder had derivatively filed an application on behalf of the carrier? [See (1) under "Reasons Relied on for Allowance of the Writ," pp. 13 to 14 and Point I of Brief, pp. 22 to 30.]

(2) May a Circuit Court of Appeals *require* the Board to reopen a compulsory extension proceeding initiated by it under Section 401(h) of the Civil Aeronautics Act, which the Board has dismissed without examining such questions as those indicated in the preceding paragraph, and to deal with such issues in that proceeding, when the Board has determined that the public interest would be better served by considering such quesions, to such extent as it has power to do so, in a separate proceeding under other sections of the Act? [See (2) of "Reasons Relied on for Allowance of the Writ", pp. 15 to 16 and Point II of Brief, pp. 31 to 36.]

(3) Even assuming, *arguendo*, that the two preceding questions were to be answered in the affirmative, may a Circuit Court of Appeals reverse such an order dismissing a compulsory extension proceeding solely because of the Board's failure to examine into issues such as those described in paragraph (1), where at no time during the course of the administrative proceeding had the party seeking review objected to the Board's failure to consider such questions? May this be done despite Section 1006(e) of

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the Civil Aeronautics Act of 1938, as amended (49 U. S. C. §646(e), 52 Stat. 1024, 54 Stat. 1235), providing that no objection to an order of the Board shall be considered by the court unless it was urged before the Board or reasonable grounds appear for the failure to do so? [See (3) of "Reasons Relied on for Allowance of the Writ," pp. 17 to 18 and Point III of Brief, pp. 37 to 39.]

(4) Is it consistent with the accepted and usual course of judicial proceedings for a Circuit Court of Appeals to decide novel and important questions of Federal administrative law such as those stated above, on the basis of a theory never advanced prior to the court's opinion and thus without giving the parties an adequate opportunity to be heard? [See (4) of "Reasons Relied on for Allowance of the Writ," pp. 18 to 19 and Point IV of Brief, pp. 39 to 41.]

(5) Under Section 1006(a) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. §646(a), 52 Stat. 1024, 54 Stat. 1235), which limits the right to review to persons "disclosing a substantial interest" in the order of which review is sought, does a Circuit Court of Appeals have jurisdiction, on the petition of a stockholder, to review orders which simply terminate a proceeding, begun by the Board on its own initiative, to determine whether the corporation should be compelled to operate a route for which it has not applied? [See (5) under "Reasons Relied on for Allowance of the Writ," pp. 19 to 20 and Point V of Brief, pp. 41 to 46.]

Reasons Relied on for Allowance of the Writ.

The importance of the points here decided by the Circuit Court of Appeals would, it is submitted, require review by this Court even if the issues were such as could arise only under the Civil Aeronautics Act and there were no inconsistency between the decision of the Court of Appeals and decisions of this Court or in other Circuits. The case for review by this Court is the more compelling when it is considered (a) that the decision of the Court of Appeals will constitute a precedent under such other Federal regulatory statutes as the Transportation Act of 1940, 49 U. S. C. §1, 54 Stat. 898, the Motor Carrier Act, 49 U. S. C., §301, 49 Stat. 543, the Federal Communications Act, 47 U. S. C., §151, 48 Stat. 1064, and the Federal Power Act, 16 U. S. C., §791, 49 Stat. 863; (b) that the principal decision taken by the Court of Appeals is founded primarily on a belief, stated by that court, that the authority of this Court's decision in *Pittsburgh & West Virginia Ry. Co.* v. *U. S.*, 281 U. S. 479 (1930), has been impaired by a subsequent decision (R. 370); and (c) that in other respects the decision of the Circuit Court of Appeals is in conflict with decisions of this Court and of other Circuits.

Although the decision of the court below remands the cause for further proceedings before the Civil Aeronautics Board and thus does not, in form, finally dispose of the matter, a writ of certiorari should be granted at this stage. The important questions involved are clearly presented now. This Court should not delay its clarification of the confusion created by the lower court's decision pending final disposition of the cause by the Board. Furthermore, as will appear at pp. 34 to 36, *infra*, if the decision of the

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Circuit Court of Appeals were allowed to stand, these petitioners might never again be able to obtain review of these questions by this Court.

The following specific considerations are deemed to bring this petition within Rule 38, par. 5(b), of this Court:

(1) The Circuit Court of Appeals has decided an important question as to the scope of the jurisdiction of Federal administrative agencies erroneously and in a manner that conflicts with the decision of this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S.*, 281 U. S. 479 (1930).

The principal point decided by the Court of Appeals was that where one stockholder of an air carrier contends that another is using its voting power to the prejudice of the air carrier, this purely legal question as to who has the right to "speak for" the carrier may be determined by the Civil Aeronautics Board as an incident to a certificate proceeding rather than being left for decision by the courts.

The court's decision neither purports to be nor can be logically limited to the unusual facts of this case where stock ownership of the carrier is evenly divided between two persons. It applies equally whenever a board of directors has refused to apply for a route extension contrary to the wishes of a stockholder who is willing to make the necessary allegations against the directors. Neither is it confined to cases where a carrier has refused to apply for a certificate. For if the Board, on the complaint of one stockholder, must inquire whether *failure* to apply for a certificate was due to "illegality" or "fraud" on the part of another, the Board must also be bound to inquire whether an *application* for a certificate was actuated by the best interests of the carrier or by some allegedly unlawful mo-

tive. Nor is the force of the decision as a precedent limited to the Civil Aeronautics Act. If the Civil Aeronautics Board has jurisdiction in compulsory or voluntary extension proceedings to determine the legal rights and wrongs of the feasances and non-feasances of air carrier directors and stockholders, similar jurisdiction must exist in the Interstate Commerce Commission, the Federal Communications Commission and the Federal Power Commission. Until the decision of the Court of Appeals has been reviewed by this Court, neither these tribunals nor litigants before them will know where they stand.

This issue of the power of Federal administrative agencies to consider in certificate proceedings a complaint by one stockholder that another was abusing its voting power did not arise in this case for the first time. It was decided by this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S.*, *supra*. There the Court held that the administrative agency is to take a carrier as the agency finds it, leaving the courts to determine disputes as to who has the legal right to speak for it. The Court of Appeals conceded that the point here involved was, in essence, identical with that presented in the *Pittsburgh & West Virginia* case (R. 370). But the court refused to follow this Court's decision, thinking it to have been silently overruled by *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385 (1945). The court was clearly in error in this view, as we will show below (pp. 25 to 30). But in any event this Court can hardly permit a decision which it has never questioned to be disregarded by a lower court on the theory that this Court has overruled it without saying so. [See Point I of Brief, pp. 22, to 30.]

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(2) The Circuit Court of Appeals has wrongly intruded on the Board's discretion as to the manner in which proceedings before the Board should be conducted and the order in which issues should be determined, in disregard of the admonition of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940).

When the Board instituted the compulsory extension proceeding (Docket 779), it was fully familiar with the different charges and countercharges in its files respecting Pan American-Grace. In the exercise of its sound discretion, it determined that the public interest would be best served by instituting a proceeding to determine whether the public convenience and necessity required the extension proposed, by confining the issues in that proceeding to whether the Board could order such an extension as a matter of legal power and should order it as a matter of convenience and necessity, and by *not* including in such a proceeding either Grace's charges in Docket 744 against Pan American or Pan American's countercharges against Grace. Grace made no objection to this course. Instead, it specifically urged that the issues presented by Docket 744 be excluded from Docket 779 (R. 342-49; B. R. 153; App. II, 402-406).

In its opinion of May 24, 1944, the Board decided that it was without power to act under Section 401(h) and that Docket 779 must therefore terminate (R. 32-47). It said nothing with respect to the issues raised by Grace's petition and Pan American's cross-petition in Docket 744. Of course, it retained jurisdiction to take such action thereon as might be justified by the facts and within its statutory powers. No request that it do so has been made

by Grace in the nearly two years that have elapsed since the Board's dismissal of Docket 779.

The decision of the court below requires the Board to abandon the procedure which it determined, with the acquiescence of all parties and at the affirmative request of the party seeking review of the Board's order, to be best adapted to an orderly administration of the Act. It directs the Board to consider in the compulsory extension proceeding, as inseparably related issues, the question whether public convenience and necessity require the route proposed and the claim that Pan American's refusal to sanction an application for the route was an unfair competitive practice or otherwise unlawful.

This usurpation by the court of the discretion of the Board as to the order in which matters presented to it shall be considered is contrary to Section 1001 of the Act (49 U. S. C. §641, 52 Stat. 1017, 54 Stat. 1235), is in direct conflict with the decision of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co., supra,* and is in no way supported by the decision in *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U. S. , 66 Sup. Ct. 148 (1945), on which the court relies.

The decision of the Court of Appeals in this respect is also in conflict with the decisions of the Court of Appeals for the District of Columbia in *Ward* v. *Federal Communications Commission,* 108 F. (2d) 486 (1939) and *Evans* v. *Federal Communications Commission,* 113 F. (2d) 166 (1940). [See Point II of Brief, pp. 31 to 36.]

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(3) The Circuit Court of Appeals, in basing its decision on a determination of issues not raised, briefed or argued before the Board or brought to the Board's attention on petition for reargument and reconsideration, has departed from the accepted and usual course of judicial proceedings and has disregarded the express limitation on its powers of review embodied in Section 1006(e) of the Civil Aeronautics Act of 1938.

This Court has repeatedly and emphatically called to the attention of the Circuit Courts of Appeal their duty to respect the policy of Congress that judicial review should be limited to issues which have been presented and passed upon by the administrative bodies—and to manifest that respect by something more than paying lip service. Here the Court of Appeals did not do even that. It failed to give any consideration to the argument that nothing remotely resembling the point on which it reversed the Board's order had been brought to the Board's attention in the extension case. Although Section 1006(e) of the Act was cited to the court in supplemental briefs for which the court called after the argument (App. II, 449), the court does not refer to the Section except in an appendix to its opinion—in itself a most unusual document—detailing certain reasons on which the court was *not* basing its action (R. 374-379). The court was so full of its new illumination as to the *undisclosed* intent of Congress to vest administrative bodies with equity jurisdiction as to be wholly intolerant of the suggestion that it heed Congress' *definitely* disclosed intention that the courts were to keep such illumination to themselves unless proper objections had first been presented to the administrative agency concerned.

In this respect the court's decision is contrary to the decisions of this Court in *N. L. R. B.* v. *Cheney California*

Lumber Co., 326 U. S. , 66 Sup. Ct. 553 (1946); *Panhandle East. P. L. Co.* v. *Federal Power Commission.*, 324 U. S. 635 (1945); *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253 (1943); and see *May Dept. Stores Co.* v. *N. L. R. B.*, 326 U. S. , 66 Sup. Ct. 203 (1945). It conflicts also with decisions of other Circuit Courts of Appeals under similar statutory provisions. *American Power & Light Co.* v. *Securities and Exchange Commission*, 141 F. (2d) 606, 612 (C. C. A. 1st, 1944); *Todd* v. *Securities and Exchange Commission*, 137 F. (2d) 475, 478 (C. C. A. 6th, 1943); *Pacific Power & Light* v. *Federal Power Commission*, 141 F. (2d) 602 (C. C. A. 9th, 1944). [See Point III of Brief, pp. 37 to 39.]

(4) The Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings by resting its decision on matters not raised, briefed or argued before it.

The court below disregarded the universal rules of appellate practice that a reviewing court will not consider points not raised before it by the parties or change the theory on which the cause was tried below. By disregarding these rules, the court denied these petitioners a fair hearing and violated the rules of "fair play" which, under the Fifth Amendment to the Constitution, are as binding on the Federal courts as they are upon administrative agencies.

In this respect the decision of the Circuit Court of Appeals conflicts with the decisions of this Court in *Morgan* v. *U. S.*, 304 U. S. 1 (1938); *Ohio Bell Tel. Co.* v. *Comm'n*, 301 U. S. 292 (1937); *Flournoy* v. *Wiener*, 321 U. S. 253, 261 (1944); *Helvering* v. *Cement Investors*, 316 U. S. 527, 535 (1942); *Blair* v. *Oesterlein*, 275 U. S. 220 (1927); and with decisions in the Fourth, Eighth, Ninth and Tenth Circuits, *Hutchinson* v. *Fidelity Investment Ass'n.*, 106 F. (2d) 431

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(C. C. A. 4th, 1939); *Helvering* v. *Rubenstein*, 124 F. (2d) 969 (C. C. A. 8th, 1942); *Lumbermen's Mutual* v. *McIver*, 110 F. (2d) 323 (C. C. A. 9th, 1940); *Jones* v. *Tower Production Co.*, 120 F. (2d) 779 (C. C. A. 10th, 1941). [See Point IV of Brief, pp. 39 to 41.]

(5) The Circuit Court of Appeals, in deciding that Grace, a stockholder asserting no more than a general interest in what Grace conceives to be the welfare of the corporation, has standing to seek review of the orders complained of, has erroneously applied to Section 1006(a) of the Civil Aeronautics Act, which requires a showing of "substantial interest", decisions under other statutes containing less stringent tests. It has thus created confusion as to the standing of a stockholder to seek review of orders of the Civil Aeronautics Board in particular and of administrative agencies generally.

The court assumed jurisdiction to review the orders of a Federal administrative body on the petition of a person neither having a direct legally protected interest in the result achieved by the Board's orders nor, since dismissal of the compulsory extension proceeding ended the controversy between the corporation and the Board, even possessed of a derivative right. Without even referring in its opinion to the issues which had been raised before it concerning the scope of the class afforded judicial review under Section 1006(a) of the Act, the court below decided this important question of Federal law in a manner which conflicts with the decisions of this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S., supra; Schenley Distillers Corp.* v. *U. S.*, U. S. , 66 Sup. Ct. 247 (1946); *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295 (1940); *Edward Hines Yellow Pine Trustees* v. *U. S.*, 263 U. S. 143

(1923); *Alexander Sprunt & Sons, Inc.* v. *U. S.*, 281 U. S. 249 (1930); *American Power & Light Co.* v. *Securities and Exchange Commission* and *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385 (1945). [See Point V of Brief, pp. 41 to 46.]

If the decision of the Circuit Court of Appeals is allowed to stand, it may result in serious injustice to the petitioners, will place serious and unintended burdens on the Civil Aeronautics Board and other Federal administrative agencies, and will cause confusion in the administration of important Federal legislation and in the review of action of Federal administrative agencies.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit should be granted.

PAN AMERICAN AIRWAYS CORPORATION and
PAN AMERICAN AIRWAYS, INC.
Petitioners,

By HENRY J. FRIENDLY,
Attorney for Petitioners.

JAMES P. KRANZ, JR.,
Of Counsel.

May 20, 1946.

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BRIEF IN SUPPORT OF PETITION.

The Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 351-79) and that Court's *per curiam* opinion denying petitions for rehearing (R. 427-31) were rendered January 28, 1946 and February 21, 1946, respectively, but have not yet been officially reported. The opinion of the Civil Aeronautics Board (R. 32-47), rendered May 24, 1944, is reported, 4 C. A. B. 670.

Statutes.

Pertinent statutory provisions are set forth in Appendix I, *infra*, pp. I-VIII.

Specification of Errors.

The Court of Appeals for the Second Circuit, in setting aside the orders of the Civil Aeronautics Board, erred in each and all of the respects referred to in the point headings set forth below.

ARGUMENT.

I. The Circuit Court of Appeals held that the Civil Aeronautics Board had jurisdiction in a compulsory extension proceeding to inquire whether the failure of the carrier to apply for the extension was due to "illegality" or "fraud" on the part of one stockholder and, in the event of an affirmative finding, to consider the proceeding as if begun by a voluntary application derivatively filed by another stockholder. In so doing, the Circuit Court of Appeals decided an important question of Federal law erroneously and in conflict with the decision of this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S.*, 281 U. S. 479 (1930).

The basic decision taken by the Court of Appeals was that Congress has authorized Federal regulatory agencies, such as the Civil Aeronautics Board, to determine in compulsory extension proceedings whether the failure of the carrier to make a voluntary application is the result of "fraud" or "illegality" on the part of a stockholder and in the event of an affirmative finding to proceed as if a voluntary application had been made.

The issues on remand, the court tells us, "would be whether the Pan American Company was opposing the extension because it was pursuing its own advantage to the prejudice of the joint interest ('fraud'), and because it was engaging in some unfair trade practice ('illegality')." (R. 371). The latter suggestion is that in the compulsory extension proceeding under Section 401(h) the Board should conduct the same sort of inquiry as to unfair trade practices permitted by Section 411 but, instead of making the cease and desist order which Section 411 authorizes, may, without any order at at all, deal with the compulsory

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extension proceeding as if it were a voluntary one. The former suggestion is definitely that the Board should exercise equity powers. The Board is not only to sit in judgment as to whether Pan American is entitled to act on its belief that from the standpoint of "the joint interest" the extension would be a mistake, but is also to determine how far Pan American may lawfully stand on the 1928 and 1939 agreements,—and this even if the legality of these agreements is conceded. For, as the court somewhat mysteriously tells us, "even if those agreements were legal, it does not follow that Pan American is not using its voting power in Panagra illegally" (R. 374).

The decision thus taken by the Circuit Court of Appeals neither purports to be, nor can its principle logically be, limited to a case where ownership of a carrier is equally divided, or to compulsory rather than voluntary certificate proceedings, or to the Civil Aeronautics Board as contrasted with other Federal administrative agencies having regulatory powers over public utilities. The decision necessarily involves a holding that Congress has vested all these agencies with jurisdiction over questions of right and wrong as between stockholders and relating to the action of directors which have never previously been thought to come within their province.

If this question had never arisen heretofore, an authoritative pronouncement by this Court on so novel and important an issue for the guidance of all Federal administrative agencies and the lower courts would be required. Much clearer statutory language than anything in the Civil Aeronautics Act would seem to be needed to support a conclusion that Congress intended to commit to an administrative agency the decision whether one stockholder had so transgressed the law as to permit another to "speak for" the corporation,—particularly when, as the court indicates,

decision by the administrative agency on this question of corporate right would be "intricately intermeshed" (R. 374) with the agency's views on the ultimate question of public convenience and necessity. Nothing in the Act suggests that the Board may have a broader jurisdiction to compel an extension by a carrier which is a corporation with several stockholders than by a carrier which is an individual or a corporation with a single stockholder.

The facts are, however, that the problem is not a new one, that this Court has already decided it, that this Court's decision is directly contrary to that now taken by the Circuit Court of Appeals, and that the court below reached the conclusion that it did only on the basis of a belief (mistaken, as we will show below) that this Court had silently departed from its previous ruling. In the orderly administration of justice the status of one of this Court's decisions as a precedent should be finally determined by this Court and not left to be the subject of conflicting speculation by the lower courts.

Our reference is to the decision of this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S., supra.* The Court of Appeals accurately summed up this decision as being "that, in reviewing an order of the Interstate Commerce Commission, the court might not examine whether the majority shareholders of a railroad, a party to the proceeding, were abusing their power in taking the position in the proceeding which they did. Such an inquiry was to be reserved for a separate suit, and could not be interjected into the controversy before the Commission." (R. 370). The holding of the *Pittsburgh & West Virginia* case on this point was reaffirmed by this Court in *New York Central Securities Corp.* v. *U. S.*, 287 U. S. 12, 28 (1932).

Recognizing the analogy between the problem here presented and that in the *Pittsburgh & West Virginia* case, the

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Court of Appeals deliberately declined to follow the clear lead given by this Court's decision. It did this primarily because it thought the decision had been silently overruled, saying that "in spite of some differences which we will point out, we might feel that decision conclusive here, were it not for the decision in *American Power & Light Co.* v. *Securities & Exchange Commission*, 325 U. S. 385, particularly that part of it which dealt with Okin's appeal." (R. 370). Only a brief analysis is required to show the error of the Court of Appeals in believing that the authority of the *Pittsburgh & West Virginia* decision had been impaired by the *Okin* case.

The *Okin* case involved the right of a stockholder to secure review, under Section 24(a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79x(a), 49 Stat. 834), of approval by the Securities and Exchange Commission of a financial transaction affecting the corporation in which he held stock. The proceedings before the Commission had begun on joint applications and declarations filed by American & Foreign Power Co. and its parent Electric Bond & Share Co., for approval of a plan under which American & Foreign would refinance certain of its obligations held by Electric Bond, and Electric Bond would use certain of the proceeds, together with that of the sale of bonds of other subsidiaries, to purchase its own preferred stock in the open market.* Over the objection of Okin, a stockholder of Electric Bond, that the refinancing would reduce Electric Bond's income, and consequently the value of his stock, the Commission granted approval. Okin thereupon sought review of the Commission's order. This Court, affirming a decision of the Court of Appeals for the Second

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* *In the Matter of Am. & Foreign Power Co., Inc.; Electric Bond & Share Co.*, Securities and Exchange Comm'n. Release No. 4855, Jan. 25, 1944.

Circuit, held that Okin was a "person or party aggrieved" within the meaning of Section 24(a) of the Public Utility Holding Company Act and could obtain such review.

In order to find an inconsistency between the *Pittsburgh* case and *Okin's* case the Court of Appeals, by a fine spun analysis of the latter decision (R. 370-71), manages to come to the conclusions that this Court's judgment sustaining Okin's standing to sue *must* have rested on a holding that Okin could assert derivatively a right of Electric Bond, that therefore this Court must have thought the Securities and Exchange Commission could determine whether the acts of Electric Bond's directors were so tainted by "illegality and fraud" as to give Okin a derivative right to "speak for" Electric Bond, and that consequently agencies like the Civil Aeronautics Board could do the same.

The premise of this analysis is an attribution to this Court of an intention which this Court not only did not express but directly repudiated. The *Okin* decision was *not* based upon the ground that Okin might be heard to assert derivatively a right of Electric Bond. This Court clearly stated that, *quite apart from any question of derivative right,* Okin was a "person aggrieved" within the comprehensive language of Section 24(a) of the Public Utility Holding Company Act. As this Court said (p. 392), "we do not deem it essential that the proceeding have the character of a derivative suit."

The issue and the only issue in the *Okin* case was Okin's standing to obtain review. This Court decided that issue, not on any theory of derivative right but on the theory that Okin fell within the class authorized by Congress to obtain review. *Okin's* case did not present at all the question here presented, namely, whether an administrative agency for the regulation of carriers has been given any authority to

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determine in the course of certificate proceedings questions of right and wrong as between the carrier and its stockholders. The jurisdiction of the Securities and Exchange Commission to determine whether Electric Bond's proposals were in the interests of its stockholders was not disputed by anyone. Indeed, this was the very job which the Commission had been given. There was never any suggestion that before the Commission could hear an objection by a stockholder to Electric Bond's proposals, it must first find that the acts of the latter's directors were illegal or fraudulent. It is thus sheer distortion to find anything in this Court's holding in the *Okin* case in the least degree inconsistent with the determination in the *Pittsburgh & West Virginia* case that a Federal administrative agency charged with the regulation of transportation does not have jurisdiction similar to that of an equity court to decide whether the acts of a particular stockholder have been such as to entitle another to "speak for" the corporation.

To put the matter in another way, *Okin's* case arose under a statute which by its very terms projects the administrative agency into the determination of intracorporate matters, whereas the *Pittsburgh & West Virginia* case and this case arise under statutes concerned with the relations among carriers and between them and the traveling and shipping public.

Moreover, if this Court had intended *Okin's* case to overrule or qualify a decision so important to the jurisdiction of Federal administrative agencies as the *Pittsburgh & West Virginia* case, it would certainly have said so. Instead it cited the *Pittsburgh & West Virginia* case without qualification on the point of the usual lack of standing of stockholders to seek review of administrative action, as it has done again in a case decided at the present term,

Schenley Distillers Corp. v. *U. S.* U. S., , 66 Sup. Ct. 247 (1946). The Circuit Courts of Appeals should not be encouraged to find in this Court's opinion an undisclosed intention to impair the authority of previous decisions.

Since the court below was thus mistaken in relying on *Okin's* case as a basis for refusing to follow the *Pittsburgh & West Virginia* decision, on the court's own statement (*supra*, p. 14), this should end the matter. While the court refers to some other "differences which we will point out" (R. 370), its principal opinion can be searched for them in vain. Certain portions of the opinion denying rehearing (R. 427-30) were evidently intended to fill this gap. They do not do so.

The Court of Appeals refers to the dominance of the public interest in proceedings under the Civil Aeronautics Act and to the power of the Board over certain matters internal to a carrier (R. 430). Surely, however, the public interest is none the less dominant in proceedings under the Interstate Commerce Act. Even a casual comparison shows how closely the Civil Aeronautics Act was modeled on the earlier legislation relating to the regulation of transportation companies. Such powers over the internal affairs of air carriers as were granted to the Civil Aeronautics Board do not differ in substance from those previously granted to the Interstate Commerce Commission respecting surface carriers. Moreover, such powers as were granted over internal matters are powers to do specific things. The grant of power to the Board to prevent a particular person from sitting as a director of an air carrier is not a grant of power to determine whether a vote cast by a director may be disregarded. When Congress vested the Board with certain definite powers

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over the internal affairs of air carriers, it no more authorized the Board in effect to take over a corporation whenever necessary to accomplish a goal deemed to be in the public interest than when it conferred substantially similar powers upon the Interstate Commerce Commission.

The court's statement that the *Pittsburgh & West Virginia* case "involved nothing like the public interest patently here involved" (R. 430) is simply a confession of inability to find any tenable ground of distinction between the two cases. Whether an administrative agency is authorized to treat a stockholder as if he were "speaking for" the carrier cannot depend on whether a reviewing court considers the public interest in duplicating an existing air service between Florida and the Canal Zone to be greater than in the building of a union railroad terminal in Cleveland.

In a final effort to support its holding, the court argues that determination whether a stockholder in an air carrier is exercising his voting power in an unlawful manner demands a "specialized acquaintance with commercial aviation and its ramifications", and that to require such a question to be decided by the courts is to place the determination of such issues in a "relatively incompetent tribunal" (R. 371). In other words, the court believes that an administrative agency, whose members are not required to be and in many cases are not lawyers and who are used to looking at all problems from the standpoint of public interest rather than of private right, is better equipped than the courts to determine whether the acts of a stockholder accord with his lawful rights. The validity of such a proposition is, to say the least, debatable and would seem to be for Congress to determine. For present purposes, it is enough that the Pittsburgh & West Virginia's charges against the controlling stockholders of the Wheeling & Lake Erie called for precisely the same type of expertise in the railroad

field as do Grace's charges in that of air transportation. Yet the decision of the *Pittsburgh & West Virginia* case was what is was.

This phase of the decision of the court below calls for exercise of the reviewing powers of this Court for reasons parallel to those which recently prompted this Court to grant certiorari and reverse the judgment of the Circuit Court of Appeals for the Third Circuit in *Jacob Siegel Co.* v. *Federal Trade Commission,* U. S., , 66 Sup. Ct. 337; U. S. , 66 Sup. Ct. 758, 759 (1946). A directly applicable decision which this Court evidently considers in good standing has been disregarded by the court below on the basis of an impression that a later decision has impaired its authority. The later decision does nothing of the sort, and the other grounds relied upon by the Court of Appeals to distinguish this case from the *Pittsburgh & West Virginia* case are meaningless. For purposes of this petition, however, it is enough that the Court of Appeals has consciously created a situation where neither the Civil Aeronautics Board nor other Federal public utility regulatory agencies can know what their jurisdiction is over such intracorporate questions as those presented in the *Pittsburgh & West Virginia* case, the *New York Central Securities* case and here. Presumably the Court of Appeals itself neither supposed nor desired that this status should continue.

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II. The Circuit Court of Appeals reversed the Board's determination that all questions as to its powers to deal with the charges and countercharges of Pan American and Grace should be considered in a separate proceeding and not in the compulsory extension case. By so doing, it wrongly intruded on the discretion of a Federal administrative agency as to the order in which issues should be considered before it, in disregard of the admonitions of this Court.

When this proceeding (Docket 779) was instituted, there was already before the Board another proceeding (Docket 744) which contains the only specific charges of what the Court of Appeals has termed "illegality and fraud" ever made against Pan American with respect to the matters which the court directs the Board to hear in this proceeding and the only prayer for relief based thereon (See pp. 5-6, *supra*).

Grace's complaint in Docket 744 raises the very issue whether Pan American's use of its voting power to oppose an application for the extension was an "unfair trade practice" which the court directs the Board to consider as an incident to the compulsory extension proceeding under Section 401(h). To be sure, Grace's complaint did not include the new theory contributed by the court that even though Pan American's use of its voting power in Pan American-Grace violated no statutory command, the Board might nevertheless disregard it. It is manifest, however, that Congress has not given and could not give the Board any such general equity jurisdiction and that such power, if any, as the Board may have over Pan American's voting of its stock in Pan American-Grace must stem either from Section 411 of the Civil Aeronautics Act

or from the anti-trust laws. It follows that any power which the Board has, to deal with the question with which the Court wishes the Board to deal, can be exercised in Docket 744.

In the exercise of the discretion confided to it by Congress, the Board determined that the public interest would best be served if it were first to determine, without going into the issues in Docket 744, whether it had power to compel the extension proposed and whether public convenience and necessity required such an extension. This course received the whole-hearted approval of Grace (R. 346-49; B. R. 153; App. II 402-406).* Upon the Board's determination on May 24, 1944 in Docket 779, that it lacked jurisdiction to compel the extension because of the change in the character of the carrier which the extension would bring about, the Board was in a position to take up the charges in Docket 744. Instead of requesting the Board to expedite proceedings under Docket 744, Grace filed a petition for review of the Board's order dismissing Docket 779 (R. 164-76). It was this action by Grace, not the procedure adopted by the Board, that has been responsible for much of the delay that caused the Court of Appeals concern (R. 372-73, note 5).

By the decision sought to be reviewed, the Court of Appeals has upset the procedure adopted by the Board as

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* The reasons for Grace's desire that the issue of the extension should be determined without reference to the charges in Docket 744 are clear enough. Grace's interest was in the extension and in that alone. If it could obtain the extension, it was quite content to permit Docket 744 to lapse. It had far greater cause than Pan American to fear the result of an inquiry by the Board under Section 7 of the Clayton Act. For, while Pan American's acquisition of stock in Pan American-Grace was an acquisition of stock in an extension of its lines and thus outside the scope of the Clayton Act (see p. 34, *infra*), Grace had acquired stock of an airline directly competing with its steamship routes.

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best suited to the orderly administration of the Act and has, in effect, ordered the Board to consider the charges of unfair competition and of violation of the Clayton Act presented in Docket 744 as an incident to the proceeding under Section 401(h) in Docket 779. In this respect, the decision conflicts directly with *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940) and *Fly* v. *Heitmeyer*, 309 U. S. 146 (1940), wherein this Court directed reviewing courts to refrain from disturbing the exercise of discretion by Federal administrative agencies as to the procedure to be followed in ascertaining the public interest, saying (309 U. S. at 138):

> "Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest."

Actually, the Board's procedure was not only permissible but was far better designed to protect the rights of the parties than that which the Court proposes to force upon it. In Docket 744 definite issues as to the charges of unfair trade practice and violation of the Clayton Act will be framed, and the parties will be able to adduce evidence to meet them. On the other hand, under the requirements of the Court of Appeals, a proceeding which was heard throughout as a compulsory extension proceeding under Section 401(h) involving only questions of public convenience and necessity, is to be converted *ab initio* to include

issues under Section 411 as well as the type of issue arising in a stockholder's suit. If the proceeding is conducted as the court directs, there will be an inevitable tendency—which the court appears, in fact, to have welcomed (R. 374)—that the question of unlawful corporate conduct will become so blended with questions of public convenience and necessity as to prevent a determination of the former issue, free from the impact of views held with respect to the latter.

Moreover, under the procedure directed by the court, Pan American finds itself in the unenviable position where a purely legal question may be decided against it by an administrative agency and yet *it may have no opportunity whatever* for judicial review. If the Board after a hearing in Docket 744 were to decide that for a stockholder to vote stock in an air carrier, in line with his judgment as to the best interests of the carrier and consistently with a lawful understanding made when the stock was acquired, was an unfair or deceptive practice or an unfair method of competition under Section 411, such a decision would present an issue of law reviewable by the courts. Similarly if the Board were to make an order in Docket 744 requiring Pan American to divest itself of stock in Pan American-Grace under Section 7 of the Clayton Act, although (1) the stock acquired was not in a "corporation engaged in commerce", (2) the acquisition could not have resulted in a substantial lessening of competition, and (3) in spite of the fact that the acquisition was within the blanket exemption permitting common carriers to extend their lines through acquiring stock of other carriers, the Board would be obliged to subject its order to judicial scrutiny in an enforcement proceeding. However, if the Board were to make these same determinations under the guise of a holding of "illegality and fraud" in the compulsory extension proceeding, *there is the gravest doubt that Pan American*

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could secure judicial review at all. The court directs that the issues whether Grace is entitled to "speak for" Pan American-Grace and whether the public convenience and necessity require the extension should be decided not *seriatim* but together (R. 374). A decision determining both of these issues in favor of Grace would be subject to the approval of the President under Section 801 of the Act.* In *Pan American Airways Co.* v. *Civil Aeronautics Board,* 121 F. (2d) 810 (C. C. A. 2nd, 1941), the Court of Appeals held that an order subject to such approval was not reviewable.

Apparently without the slightest consideration of such matters as these and, as will be later shown, without even affording opportunity for argument thereon, the court has held that the Board *must* decide, in the compulsory extension proceeding, questions which the Board properly reserved for separate determination in Docket 744. This decision is in conflict not only with the decision of this Court in the cases cited, but also with the decisions of the Court of Appeals for the District of Columbia in *Ward* v. *Federal Communications Commission,* 108 F. (2d) 486 (1939) and *Evans* v. *Federal Communications Commission,* 113 F. (2d) 166 (1940).

Ashbacker Radio Corp. v. *Federal Communications Commission,* 326 U. S. , 66 Sup. Ct. 148 (1945), on which the Court of Appeals relied (R. 372), presented a wholly different situation. There the action of the Federal Communications Commission in granting one of two mutually exclusive applications for a license for all practical purposes denied the other applicant the right to the hearing contemplated by Congress, thus presenting an error of law subject to correction by a reviewing court. Here the procedure adopted by the Board has prejudiced no right of

* 52 Stat. 1014, 54 Stat. 1235, 49 U. S. C. §601.

Grace and the court's only quarrel is that the Board has considered "divisible" something that the court conceives to be "indivisible". This is a matter to be decided by the Board and not by the courts.*

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* A footnote to the opinion of the court below (R. 372) may indicate that the Court felt the *Ashbacker* case to be applicable because of another proceeding (Docket 525) involving applications by various companies for certificates to operate air service to Latin America including the route between the continental United States and the Canal Zone, which had been heard by the Board. The court seems to have felt that if one of these applications were to be granted, all opportunity for the Board to accomplish anything in Docket 744 would be frustrated, in the same manner as the Federal Communication Commission's opportunity to grant Ashbacker's application was frustrated by the granting of a construction permit to Fetzer, a rival applicant, and that the remand directed by the court was the only way to prevent this. The court dwelt on this although the record before it contained nothing in regard to the existence or status of Docket 525. On this being called to the court's attention, the court stated in its opinion on rehearing (R. 431) that it did not in any way rest its decision on the circumstances just recited but used them merely as illustrative.

However, it is worth pointing out that if there had been opportunity to argue these matters, the court could have been shown that the circumstances differed from those in the *Ashbacker* case in the following respects among others; (1) There is not the same factor of physical impossibility of granting more than one application; (2) Whereas in the *Ashbacker* case the Federal Communications Commission had already granted Fetzer's application, the Board is under no compulsion to grant any of the applications in Docket 525 for the Miami-Canal Zone route, and may as readily hold these pending action in Docket 744 as pending further proceedings in Docket 779; (3) The remand directed by the Court of Appeals will not assist Pan American-Grace in any event. Docket 525 was finally submitted to the Civil Aeronautics Board more than a year ago. On the other hand, the court's statement that when the Board dismissed Docket 779 without inquiry into the lawfulness of Pan American's refusal to support an application, "the whole undertaking * * * lay ripe for final conclusion" (R. 373), is mere metaphor. No issue as to the lawfulness of Pan American's conduct had ever been set for hearing in Docket 779, and the court in its opinion on rehearing recognizes that "the Board should give all parties the opportunity to offer additional, relevant evidence unless the Board, in the exercise of sound discretion, rules that it is needlessly cumulative" (R. 428). Moreover, even the record made before the Board two and a half years ago has never been briefed on the merits, and no Examiner's report has ever been made thereon.

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III. The Circuit Court of Appeals reversed the Board's order because of the Board's failure to consider questions never urged before it and which the party seeking review had not sought to have it consider. By so doing, the court departed from the accepted and usual course of judicial proceedings, violated the express limitations of Section 1006(e) of the Civil Aeronautics Act and disregarded applicable decisions of this Court and of other Circuit Courts of Appeal.

Section 1006(e) of the Civil Aeronautics Act provides (49 U. S. C. §646(e), 52 Stat. 1024, 54 Stat. 1235):

> "No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

In contravention of this mandate, the court below based its decision on issues not raised, briefed or argued before the Board or even brought to the Board's attention on petition for reargument and reconsideration (R. 84-106).

The alleged error which led the Court of Appeals to reverse was that, conceding the correctness of the Board's holding that it lacked statutory power to compel the extension, the Board had not exhausted its power to act under Section 401(h), because it could and should have gone on to determine whether Grace was in a position to "speak for" Pan American-Grace and, upon an affirmative finding, to treat the proceeding as one begun on the voluntary application of Pan American-Grace derivatively filed by Grace, and to grant the application if the Board found the public convenience and necessity so required. If the failure by the Board to take this action can be made the basis of re-

versal by the court below, it is equally a ground that could have been urged before the Board by Grace. Grace's failure to raise this question before the Board, and to do so *specifically*, either at the hearings, in brief or on oral argument, or even in its petition for rehearing, is fatal to judicial review on this point.*

Contrary to the implication of the court's discussion (R. 377, 430), a general objection is not enough to satisfy the requirements of Section 1006(e). *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253 (1943). The court's attempt to escape the mandate of Section 1006(e) by saying that under the Civil Aeronautics Act "the public interest looms large" (R. 429) ignores the declared public interest in not having orders of administrative agencies continually upset by reviewing courts on the basis of objections on which the agencies had no opportunity to pass. Having failed to make specific objection to the Board's failure to consider whether it might be heard to "speak for" Pan American-Grace, Grace is in the position of having consented to judgment against itself on this issue and the issue cannot be considered by the reviewing court. *N. L. R. B.* v. *Cheney California Lumber Co.*, U. S. , 66 Sup. Ct. 553 (1946).

The decision by the Court of Appeals is directly contrary to the decisions of this Court as to substantially identical sections in other statutes in *N. L. R. B.* v. *Cheney California Lumber Co., supra; Panhandle East. P. L. Co.* v. *Federal Power Commission*, 324 U. S. 635, (1945);

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* In reading the court's opinion, it should be realized that the opening sentence of paragraph 1, "It has been suggested that the Board should have considered and decided the issue of the violation of Section 411 by treating the proceeding as if it involved Grace's petition No. 744" (R. 368-69) and similar statements in the Appendix do not refer to any suggestion made by Grace but rather to suggestions first advanced by the court itself after the cause had been argued (App. II, 325-27).

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Marshall Field & Co. v. *N. L. R. B., supra;* and see *May Dep't Stores Co.* v. *N. L. R. B.*, 326 U. S. , 66 Supp. Ct. 203 (1945). The decision below has also created a conflict between the Second Circuit and the First, Sixth and Ninth Circuits. *American Power & Light Co.* v. *Securities and Exchange Commission,* 141 F. (2d) 606, 612 (C. C. A. 1st, 1944); *Todd* v. *Securities and Exchange Commission,* 137 F. (2d) 475, 478 (C. C. A. 6th, 1943); *Pacific Power & Light* v. *Federal Power Commission,* 141 F. (2d) 602, 605 (C. C. A. 9th, 1944).

IV. The Circuit Court of Appeals set aside the orders of the Board on a ground not raised in the petition for review and not referred to in brief or argument before the court by any party. In so doing the court so departed from the accepted and usual course of judicial proceedings as to call for review by this Court.

The ground on which the Court of Appeals based its decision setting aside the order of the Board was not suggested by any of the parties at any stage of the proceeding before the Board, in the petition for review or in brief or argument before the court (R. 164-76, App. II, 1-489). The ground of decision differs also from that suggested by the court in its request for supplemental briefs (App. II, 325-27), which the court set forth in an Appendix to its opinion (R. 374-79) in language so couched as to give the impression that it was dealing with points raised by the parties rather than with ideas advanced by the court itself. The Court of Appeals was so intent on announcing its discovery as to the right of Federal regulatory agencies to authorize one stockholder to "speak for" a carrier that it was not to be deterred by any such humdrum principles as those rules of fair play embodied in the doctrine that an

appellate tribunal will not consider questions or issues raised for the first time before it and will not change the theory on which the cause was tried below.

The court's departure from accepted practice cannot be justified under its Rule 10 permitting the court at its option to notice *plain error* which has not been assigned. Such a rule could have no application to a case such as this where the Board's error, to say the least, was anything but "*plain,*" where no action had ever been taken to preserve a right to object, and where affirmance will still leave open to the party alleged to be aggrieved other and more suitable paths for asserting its claims. Indeed the error, if any there be, was invited by Grace, since Grace urged the course adopted by the Board. A party will not be heard to complain in an upper court of errors induced by it below. *Smails* v. *O'Malley,* 127 F. (2d) 410 (C. C. A. 8th, 1942).

The decision of the court below in this respect conflicts with the decisions of this Court in *Flournoy* v. *Wiener,* 321 U. S. 253 (1944); *Helvering* v. *Cement Investors,* 316 U. S. 527, 535 (1942) and *Blair* v. *Oesterlein,* 275 U. S. 220 (1927), as well as with decisions in practically ever circuit. For present purposes it is sufficient to point to the conflict of the decision of the Second Circuit in this case and decisions in the Fourth, Eighth, Ninth and Tenth Circuits. *Hutchinson* v. *Fidelity Investment Ass'n,* 106 F. (2d) 431 (C. C. A. 4th, 1939); *Helvering* v. *Rubenstein,* 124 F. (2d) 969 (C. C. A. 8th, 1942); *Lumbermen's Mutual* v. *McIver,* 110 F. (2d) 323 (C. C. A. 9th, 1940), cert. den. 311 U. S. 655 (1940); *Jones* v. *Tower Production Co.,* 120 F. (2d) 779 (C. C. A. 10th, 1941).

The action of the Circuit Court of Appeals in this case is much more prejudicial than the practices condemned in the cases cited. In all those cases the point was at least

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presented in brief and argument to the reviewing court and the parties thus had an opportunity to direct argument not only to the propriety of the court's consideration of the point but also to its merits. In the case at bar, nothing remotely resembling the ground on which the decision turned had ever been suggested until after the argument. The court then called for supplemental briefs on a theory of the case (outlined in the Appendix to the court's opinion) differing both from anything previously suggested and from that finally adopted (App. II, 325-27). Turning a deaf ear to the request that if any such grounds were to be considered, further opportunity for argument should be had (R. 387, App. II, 450), the court proceeded to decision on a still different ground of which the first notice given to the parties was the opinion of the court itself. Federal appellate courts are no more immune than other agencies of Government to the guarantee of fair hearing embodied in the due process clause of the Fifth Amendment. *Morgan* v. *U. S.*, 304 U. S. 1 (1938); and *Ohio Bell Telephone Co.* v. *Comm'n.* 301 U. S. 292 (1937).

V. The Circuit Court of Appeals necessarily held that, under the circumstances here presented, a stockholder has the "substantial interest" required to obtain review under Section 1006(a) of the Civil Aeronautics Act. In so doing, the court decided an important question of Federal law and decided that question erroneously and in conflict with applicable decisions of this Court.

The standing of a stockholder of a corporation to obtain review of an order of a Federal administrative agency relating to the corporation is a question of general import-

ance which ought to be settled for the guidance of litigants and the lower courts.

This Court has decided four cases on this subject. Two of them, *Pittsburgh & West Virginia Ry Co.* v. *U. S.*,* *supra*, and *Schenley Distillers Corp.* v. *U. S.*, *supra*, dealt with statutes regulating carriers similar to the Civil Aeronautics Act. Both cases held that under such statutes a stockholder did *not* have the substantial interest required to obtain review. The other two, *American Power & Light Co.* v. *Securities and Exchange Commission*, *supra*, and *Securities and Exchange Commission* v. *Okin*, *supra*, arose under the Public Utility Holding Company Act, a statute particularly concerned with the protection of the very class in which stockholders are included and which authorized review at the suit, not only of persons "disclosing a substantial interest" but of "any person or party aggrieved". In those two cases this Court sustained the right of the stockholder to obtain review. Here the Circuit Court of Appeals has sustained the standing to sue of a stockholder in a carrier—apparently by applying Public Utility Holding Company Act decisions to a statute having an altogether different purpose and prescribing different and more stringent tests.

This error by the Court of Appeals is the more surprising in the light of the clear understanding of the fundamental considerations involved and of the importance of differences in statutory language in "standing to sue" cases shown by the same court and, indeed, by the same judge in *Associated Industries* v. *Ickes*, 134 F. (2d) 694

* We refer here, not to the portion of the *Pittsburgh & West Virginia* decision discussed in Point I of this Brief, holding that the intracorporate question of the right of the Wheeling's directors to file the applications could not be examined either before the Interstate Commerce Commission or in a reviewing court, but to the earlier portion of the opinion holding that the Pittsburgh as a stockholder in the Wheeling had no status to obtain review of the Interstate Commerce Commission's decisions on questions of public interest which *were* properly before the Commission.

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(C. C. A. 2d, 1943). At that time Judge Frank summarized the general rule as follows (pp. 700-701):

> "In a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justiciable 'controversy,' without which, under Article III, §2 of the Constitution, the court has no jurisdiction, *unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen;* such invaded interest must be either of a 'recognized' character, at 'common law' or a substantive private legally protected interest created by statute. • • • That the plaintiff shows financial loss on his part resulting from unlawful official conduct is not alone sufficient, for such a loss, absent any such invasion of the plaintiff's private substantive legally protected interest, is *damnum absque injuria.*" (Italics supplied.)

The only exception to this general rule is in a narrow line of cases where the courts have found the terms of a particular statute to evidence an intention by Congress to allow a special class of persons to secure review of administrative action, even though such action did not infringe a legally protected right. The principal and, we believe, the only cases in this line of authority are two decisions of this Court under Section 402(b) of the Federal Communications Act (47 U. S. C. §402(b), 48 Stat. 1093), namely *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U. S. 470 (1940), and *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4 (1942); the *American Power & Light* and *Okin* cases, 325 U. S. 385 (1945), under Section 24(a) of the Public Utility Holding Company Act (15 U. S. C. §79x(a), 49 Stat. 834); and the decision of the Court below in *Associated In-*

dustries v. *Ickes, supra,* under Section 6(b) of the Bituminous Coal Act of 1937 (15 U. S. C. §836(b), 50 Stat. 85).

In each of these cases the statute granted review to persons or parties "aggrieved" and the structure and purpose of the statute definitely disclosed an intention on the part of Congress to include the persons there seeking review within the class to whom such review should be afforded. This Court explained the rationale of these decisions when it said in the *American Power* case (325 U. S. 390):

> "This court has not allowed the usual criteria of standing to sue to deny persons who, in analogous cases under that doctrine, would ordinarily not be permitted to invoke court review, the benefit of such review under statutes embodying *the same language* as §24(a) [citing *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14; *Federal Communications Comm.* v. *Sanders Bros. Radio Station,* 309 U. S. 470; and comparing *Singer & Sons* v. *Union Pac. Ry. Co.,* 311 U. S. 295.] The same is true of the lower federal courts [citing *Associated Industries* v. *Ickes,* 134 F. (2d) 694]. In these instances the extension of the privilege to *persons aggrieved* was held to extend it to those not technically parties, and, therefore, not entitled, without the statutory provision, to initiate litigation in a court." (Italics supplied.)

Nothing in this line of authority gives the slightest support to a view that Congress intended to exempt petitioners for review under the Civil Aeronautics Act from the requirement of a showing of infringement of substantive legal rights. The Act is a public utility regulatory statute of the familiar type. There is not a syllable in the Act indicating that Congress was looking to stockholders in

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air transport companies rather than to governmental authorities, on the one hand, and private companies with substantial rights in the premises on the other, to vindicate the interests which the statute was designed to protect. Section 1006(a) paraphrases the statements of the general doctrine of standing to sue expressed in cases arising under the Urgent Deficiencies Act. It is even more restrictive than Section 402(20) of the Transportation Act of 1920 (49 U. S. C. 1 (20), 41 Stat. 478) granting review to any "party in interest" which has been held by this Court to require the customary showing of an invasion of a legally protected interest of the person seeking review. *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295 (1940).

The court made no statement of the basis on which it sustained Grace's status to obtain review. It wrote no opinion when it denied the Board's motion to dismiss, and it did not discuss the point either in its opinion on the merits or in that denying rehearing. However, the very fact that, in a case arising under Section 1006(a) of the Civil Aeronautics Act, a Circuit Court of Appeals should have cited cases decided under statutes embodying a less onerous test than that of "substantial interest" will necessarily be confusing to litigants and to other courts —and this not only under the Civil Aeronautics Act but under other statutes embodying the substantial interest test. Review by this Court is therefore required even if the result at which the lower court arrived were correct.

The result, however, is manifestly erroneous. The order under review violated no direct legally protected right of Grace. It did not affect Grace directly as a stockholder as did the order in *American Power & Light Co.* v. *Securities and Exchange Commission, supra.* It simply failed to compel the corporation to do something which Grace as a stockholder wanted done. This no more violated an

independent right of a stockholder than did the order of the Interstate Commerce Commission in the *Pittsburgh & West Virginia* case authorizing the Wheeling & Lake Erie to do something which the Pittsburgh & West Virginia, as a stockholder in the Wheeling, wanted to prevent. Neither did the order violate any right of the *corporation* which Grace as a stockholder might assert derivatively on the corporation's behalf. This is so for two reasons. In the first place, the doctrine of derivative right does not apply in "standing to sue" cases under statutes like the Interstate Commerce Act and, by analogy, the Civil Aeronautics Act, as the *Pittsburgh & West Virginia* case authoritatively shows. Secondly, even if the doctrine might apply in some cases, it can not do so here. For the Board's order had no effect whatever upon the corporation. The Board simply declined to exercise coercion against it. No right of the corporation was affected which a stockholder might assert in its name.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

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JAMES P. KRANZ, JR.,
Of Counsel.

May 20, 1946.

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Appendix I.

Statutory Provisions.

Pertinent statutory provisions are as follows:

Civil Aeronautics Act of 1938, as Amended.

SECTION 401(d)(1). "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied." (52 Stat. 987, 54 Stat. 1235, 49 U. S. C. §481(d)(1).)

SECTION 401(h). "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate." (52 Stat. 989, 54 Stat. 1235, 49 U. S. C. §481(h).)

SECTION 411. "The Board may, upon its own initiative or upon complaint by any air carrier or foreign air carrier, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier or foreign air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation. If the Board shall find, after notice and hearing, that such air carrier or foreign air carrier is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier or foreign air carrier to cease and desist from such practices or methods of competition." (52 Stat. 1003, 54 Stat. 1235, 49 U. S. C. §491.)

SECTION 801. "The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of any certificate issuable under section 401(e) or any permit issuable under section 402(c) or to the original terms, conditions, or limitations of any such certificate or permit." (52 Stat. 1014, 54 Stat. 1235, 49 U. S. C. §601.)

SECTION 1001. "The Board may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. No member of the Board shall participate in any hearing or proceeding in which he has a pecuniary interest. Any person may appear before the Board and be heard in person or by attorney. Every vote and official act of the Board shall be entered of record, and its proceedings shall be open to the public upon

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the request of any interested party unless the Board determines that secrecy is requisite on grounds of national defense." (52 Stat. 1017, 54 Stat. 1235, 49 U. S. C. §641.)

SECTION 1006(a). "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore." (52 Stat. 1024, 54 Stat. 1235, 49 U. S. C. §646(a)).

SECTION 1006(e). "The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so." (52 Stat. 1024, 54 Stat. 1235, 49 U. S. C. §646(e)).

SECTION 1006(f). "The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code. (52 Stat. 1025, 54 Stat. 1235, 49 U. S. C. §646(f)).

The Clayton Act, as Amended

SECTION 7. "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such com-

merce in any section or community, or tend to create a monopoly of any line of commerce.

• • • • • •

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired. • • •" (38 Stat. 731, 15 U. S. C. §18).

SECTION 11. "Authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission, where applicable to

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common carriers subject to the Interstate Commerce Act as amended; in the Federal Communications Commission, where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938 * * *; in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission, where applicable to all other character of commerce, to be exercised as follows:

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the

United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be

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final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

"Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive. * * *" (38 Stat. 734, 43 Stat. 939, 48 Stat. 1102, 49 Stat. 704, 52 Stat. 1028, 54 Stat. 1235; 15 U. S. C. § 21).

TRANSPORTATON ACT OF 1920.

SECTION 402(20). "* * * Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *" (41 Stat. 478, 49 U. S. C. § 1(20)).

FEDERAL COMMUNICATIONS ACT OF 1934, AS AMENDED.

SECTION 402(b). "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission." (48 Stat. 1093, 50 Stat. 197, 47 U. S. C. § 402(b)).

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

SECTION 24(a). "Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *" (49 Stat. 834, 15 U. S. C. 79x(a)).

BITUMINOUS COAL ACT OF 1937.

SECTION 6(b). "Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *" (50 Stat. 85, 15 U. S. C. § 836(b)).

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Appendix II.

Pursuant to paragraph 4 of the stipulation of the parties filed in this Court (R. 436), Petitioners have filed with the Clerk of this Court, as Appendix II to this Petition and Brief, a single copy of each of the briefs filed by the parties in the United States Circuit Court of Appeals for the Second Circuit in *W. R. Grace & Co. Civil Aeronautics Board, et al.*, Docket No. 19520, and of each of the letters passing between that Court and the parties referred to in said stipulation.

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IN THE

Supreme Court of the United States

October Term, 1945

EASTERN AIR LINES, INC.,

Petitioner,

—vs.—

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORP., PAN AMERICAN AIRWAYS, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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IN THE

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October Term, 1945

EASTERN AIR LINES, INC.,

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W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORP., PAN AMERICAN AIRWAYS, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Eastern Air Lines, Inc., respectfully submits this petition for a writ of certiorari to review the judgment and decree (R. 433)* of the United States Cir-

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* Record references herein are to the printed record prepared and filed in connection with the petition of Pan American Airways Corporation and Pan American Airways, Inc. for writ of certiorari with respect to the same case. Paragraph 5 of the stipulation of the parties filed in this Court on April 10, 1946, in connection with that petition provides that the record so printed shall be entitled in each of any causes arising out of petitions for writ of certiorari filed by any party (R. 435-436).

cuit Court of Appeals for the Second Circuit entered and filed in that Court on February 25, 1946, in the case of *W. R. Grace & Co.* v. *Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., Eastern Air Lines, Inc., et al.*, Docket 19520, 154 F. (2d) 271, decided January 28, 1946, rehearing denied February 21, 1946 (R. 351, 427).

The Circuit Court of Appeals for the Second Circuit has set aside the decision and orders of the Civil Aeronautics Board in the proceeding designated as Civil Aeronautics Board Docket 779, and has remanded said proceeding for further proceedings in conformity with the opinions of said Court dated January 28, 1946 and February 21, 1946.

Statement of the Case

This case involves a proceeding known as the "Panagra Terminal Investigation" (Docket 779) instituted by the Civil Aeronautics Board ("the Board") "upon its own initiative" (R. 52) pursuant to its orders dated September 10, 1942 (R. 50) and October 22, 1942 (R. 53). Such orders purported to be issued under "Titles II, IV and X of the Civil Aeronautics Act of 1938, as amended, particularly section 401 (h) thereof." The order of September 10, 1942 recited, among other things, the following:

> (1) That W. R. Grace & Co. ("Grace") and Pan American Airways Corporation ("Pan American") "each own 50 per cent of the stock of Pan American-Grace Airways, Inc." ("Panagra").
>
> (2) "That Grace has filed with the Board a petition (Docket No. 707) for the alteration, amendment and modification of the certificate of public convenience and

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necessity of Panagra pursuant to section 401 (h) of the Civil Aeronautics Act of 1938, as amended, so as to name a point within the United States as a terminal of Panagra's route."

(3) "That Grace in its petition, Docket No. 744, alleges that Panagra, because of the opposition of its 50 per cent stockholder, Pan American Airways Corporation, is not authorized by its Board of Directors and stockholders to make application to this Board for the amendment of its certificate of public convenience and necessity so as to provide for said terminal in the United States."

(4) "The Board finding that its action herein is necessary in order to carry out the provisions of, and to exercise and perform its duties under the Civil Aeronautics Act of 1938, as amended, and acting upon its own initiative and pursuant to the powers and duties vested in it under Titles II, IV, and X of the Civil Aeronautics Act of 1938, as amended, particularly section 401 (h) thereof;

"IT IS ORDERED:

"1. That a proceeding is hereby instituted by the Board to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States • • • "

Pan American Airways, Inc. and Grace were made parties to the proceeding, as was Panagra itself (R. 52). Eastern Air Lines, Inc. ("Eastern") intervened in the proceeding, as did Pan American, National Airlines, Inc., Chicago & Southern Air Lines, Inc., TACA, S. A. and the Department of Justice (R. 37-38).

At the prehearing conference held to formulate the issues pursuant to the Board's regulations (R. 349), the following issues were established (R. 343):

> "I. Does the Board have the power to order the extension of an existing certificate by amendment when no application has been filed?
>
> "II. Does the public convenience and necessity require extension of Panagra's route to the United States?"

All parties concurred as to these issues.

Hearing commenced September 15, 1943, at which time Pan American filed a motion (R. 57) in which Eastern and others joined, to dismiss the proceeding for lack of jurisdiction, setting forth the specific ground that the Board could not under the Act order such an extension as contemplated in Docket 779 in the absence of an application. The motion was denied without prejudice to renewal at the close of the hearing (R. 38), and it was so renewed (R. 38).

By motion of December 2, 1943 (R. 67), Grace requested that argument on the motion to dismiss be deferred until final argument on the merits. This motion was denied (R. 49).

Briefs were filed and oral argument with respect to the motion to dismiss was heard on January 31, 1944. By

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order of May 24, 1944, the motion to dismiss was granted (R. 31). The Board's opinion concluded as follows (R. 46-47):

> "In the light of the conditions surrounding the extension here involved we conclude that the requiring of the extension would not be within the power granted the Board by section 401 (h) to 'alter, amend, [or] modify' Panagra's certificate. The length of the mileage of the new service and the amount of additional investment required to operate it have been factors in reaching this conclusion. However, the principal consideration which influences us is the fact that to extend the Panagra system from the Canal Zone to a point in Florida would constitute a basic transformation of the character of the carrier. Panagra, now a connecting carrier as to through traffic between the United States and South America, would be made a carrier directly serving that traffic—and serving it moreover in competition with an affiliated company. There is a fundamental difference between the position of a carrier whose routes stop so far short of the continental United States as those of Panagra and which depends upon connecting carriers for access to traffic to and from that area, and a carrier which has direct access to the continental United States over its own system. It does not seem reasonable to believe that Congress contemplated that such a change in the character of a carrier's system should be compelled by Government order. We find, therefore, that the extension of Panagra's route from the Canal Zone to the United States would not be an alteration, amendment or modification of its certificate within the meaning of

section 401 (h) of the Act in the sense that the Board could compel such an extension in the absence of an application from Panagra."

Grace filed a petition for reargument and reconsideration (R. 84) contending in substance that:

(1) The facts relied upon by the Board did not support the Board's decision (R. 86);

(2) The Board should have restricted itself to the general question of its power "to order a route extension for which no application has been made" irrespective of the facts of this case (R. 92);

(3) The Board should not have taken into consideration "any controversy between the co-owners of Panagra" (R. 101).

Grace's petition for reconsideration was denied (R. 48).

Grace's petition for review filed with the Circuit Court (R. 164) set forth substantially the same issues outlined in its petition for reconsideration filed with the Board. Briefs were filed with the Circuit Court and the case was argued on November 12, 1945. Under dates of November 29, 1945 and December 3, 1945 (see Appendix II, pp. 325-327, to Pan American's petition and brief filed in this Court), the Circuit Court requested supplemental briefs on the following points:

(1) Whether the proceeding under Docket 779 could be considered as involving Grace's "complaint" under Docket 744; and

(2) Whether the Board in Docket 779 could proceed to take action on some "petition for Panagra's extension" filed "derivatively" by Grace "on Panagra's behalf".

Supplemental briefs were filed as requested.

The Circuit Court's opinions held, in substance, as follows:

(1) That Docket 779 did not include either Docket 744 or Docket 707 (R. 369).

(2) That "for argument" the Board would be assumed "right in its holding, if Panagra was to be regarded as an unwilling carrier, and if therefore the only issue was whether the proposed extension could be forced upon it" (R. 369).

(3) That if Grace "could prove that the opposition of Pan American • • • to Panagra's applying for an extension was due to 'illegality and fraud', it would follow that this proceeding should be regarded as a voluntary application for the extension" (R. 371), since "a consent by a carrier to a 401 (h) extension proceeding begun by the Board is the legal equivalent of a petition for the same extension initiated by the carrier" (R. 431), and since something filed by Grace apparently was deemed by the Circuit Court to "speak for Panagra" (R. 372).

(4) That if an "application" were discovered in the manner indicated by the Circuit Court, then the Board should determine in Docket 779 "whether the public

convenience and necessity require the extension to be granted" (R. 373-374).

From the foregoing it will be observed that the *only* question presented to the Board or the Circuit Court was whether the Board had the power under Section 401 (h) of the Act to *require* Panagra, *in the absence of an application by Panagra,* to extend its system approximately 1200 miles north from the Canal Zone to the United States. The Board found (R. 38) and all parties conceded (R. 343) that this was the issue in the case. Thus, the Circuit Court's decision was based on a point never raised by any party either before the Board or before the Circuit Court—a point directly contrary to the findings of the Board and the concession of all parties.

Eastern and Pan American filed petitions for rehearing with respect to the Circuit Court's decision (R. 380, 402), but they were denied (R. 431). This petition for writ of certiorari seeks review of the decree (R. 433) of the Circuit Court, filed February 25, 1946, setting aside the orders of the Board and remanding the proceeding.

Jurisdiction

The Circuit Court of Appeals had jurisdiction of this case pursuant to Section 1006 of the Act (49 U. S. C., Sup. V, 646). The jurisdiction of the United States Supreme Court is supported by Section 1006(f) of the Act [49 U. S. C., Sup. V, 646(f)].

The judgment of the Circuit Court of Appeals was filed February 25, 1946; and this petition is being filed on or before May 25, 1946.

The statutory provisions involved in this case are set out at length in the Appendix to this petition and brief.

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The Questions Presented

The questions presented by this petition for writ of certiorari are the following:

(1) Whether the Circuit Court of Appeals may properly, under the Act and general principles of administrative law and due process, decide the case on review in reliance on an objection to the Board's order never raised by any party before the Board or the Circuit Court—an objection directly contrary to the findings of the Board and the position taken by all parties.

(2) Whether a stockholder has standing under the Act to file a new route application on behalf of the corporation merely upon the allegation that the corporation has failed to file such an application because of fraud and illegality.

(3) Whether the Circuit Court of Appeals properly held, contrary to the findings of the Board and the position taken by all parties, that the various filings made by Grace in Docket 779 and/or other proceedings should be considered an application in Docket 779 on behalf of Panagra.

(4) Whether the Circuit Court of Appeals may properly require the Board to consider and decide such an "application", if it exists, in the proceeding under Docket 779.

Reasons for Allowance of Writ of Certiorari

Question No. 1—As noted above, the Circuit Court of Appeals decided the case on a point never raised by any party before the Board (*i.e.*, that Grace had in some manner filed a "derivative" application on behalf of Panagra which should be considered as a part of Docket 779) or before the Circuit Court. Such action is directly contrary to Section 1006 (e) of the Act [49 U. S. C., Sup. V, 646(e)], which provides as follows:

> "No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

No "reasonable grounds" have been suggested for failure to present to the Board the objection on which the case was decided by the Circuit Court. The only attempted justification suggested by the Circuit Court for considering such objection is the following (R. 429):

> "Grace, before the Board, objected to the dismissal of the proceeding for want of jurisdiction in the Board; in its petition for review, Grace prayed 'for such other relief as to the court may seem just and proper in the circumstances.' With increasing emphasis, the Supreme Court has admonished us that, in court review of such administrative orders as this now before us, the public interest looms large. Accordingly, since this is not mere private litigation, overly nice scrutiny of the pleadings and undue stress on alleged estoppels have no place here."

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Since the entire Act is based on "the *public* interest" and "the *public* convenience and necessity" (Section 2; 49 U. S. C., Sup. V, 402), it is obvious that every party seeking review would be able to assert that his case did not involve "private litigation" but represented an attempt to vindicate "the public interest." Thus, if the Circuit Court's suggested justification (based in large part on a misinterpretation of decisions of this Court) were to be approved, Section 1006(e) would be effectively nullified.

Similar statutory limitations on review have been accorded greatest deference by the courts. *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255-256 (1943); *National Labor Relations Board* v. *Cheney California Lumber Co.,* U. S. , 90 L. Ed. 572, 574-575 (February 25, 1946); *Todd* v. *Securities & Exchange Commission,* 137 F. (2d) 475, 477, 478 (C. C. A. 6th, 1943); *National Labor Relations Board* v. *J. G. Boswell Co.,* 136 F. (2d) 585, 597 (C. C. A. 9th, 1943); *National Labor Relations Board* v. *Elvine Knitting Mills,* 138 F. (2d) 633, 634 (C. C. A. 2d, 1943).

Furthermore, general principles of administrative law require that the reviewing court consider only questions presented to the administrative agency. *General Utilities Co.* v. *Helvering,* 296 U. S. 200, 206 (1935); *Helvering* v. *Tex-Penn Co.,* 300 U. S. 481, 498 (1937); *Helvering* v. *Cement Investors,* 316 U. S. 527, 535 (1942).

It follows that the *specific statutory* limitation on review contained in Section 1006(e) of the Act, and the established judicial precedents restraining review of administrative proceedings, would be rendered nugatory if this Court were not to correct the action of the Circuit Court in this case.

Moreover, the action of the Circuit Court in deciding the case on a ground not presented by the parties in briefs or

arguments deprived the parties of the judicial hearing required by due process. *Morgan* v. *United States*, 304 U. S. 1, 18 (1938).

Question No. 2—In its opinion, the Circuit Court held that (R. 371) "if Grace & Company could prove that the opposition of Pan American * * * to Panagra's applying for an extension was due to 'illegality and fraud', it would follow that this proceeding should be regarded as a voluntary application for the extension." In its opinion on rehearing the Circuit Court further held that (R. 431) "we adhere to the view that a consent by a carrier to a 401(h) extension proceeding begun by the Board is the legal equivalent of a petition for the same extension initiated by the carrier."

From these quotations and other indications in the Circuit Court's opinions, it appears that the Court believed that something which Grace had filed, either in Docket 779 or perhaps in other proceedings (possibly Dockets 707 and 744, to which the Circuit Court referred although the pleadings and other formal papers therein were not part of the record before the Circuit Court), constituted an "application" or "consent" on behalf of Panagra (provided, of course, that Grace could prove "fraud and illegality" on the part of Pan American in opposing such an application by Panagra itself).

Such a conclusion by the Circuit Court presupposes that Grace had standing to file an application on behalf of Panagra—a corporation in which it has only the interest of a 50% stockholder. The Circuit Court apparently thought (R. 370) that this Court had recently overruled or impaired its decision in *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486-488 (1930), holding that one having *only* the interest of a stockholder lacked standing to obtain re-

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view of a decision of the Interstate Commerce Commission affecting the corporation. Plainly, the decision of this Court in *American Power and Light Co.* v. *Securities & Exchange Comm.*, 325 U. S. 385 (1945), relied on by the Circuit Court, has no such effect, but merely establishes that a stockholder having a *special* interest (specifically protected by the statute) has standing to obtain review of administrative action which would be *actively detrimental* where the corporation's management illegally and fraudulently refuses to seek review.

In the instant case Grace has no *special* interest, but only the interest of any stockholder, and no *active harm* to Panagra could possibly result from the Board's order, since both Panagra and Grace will be left in exactly the same position as before Docket 779 was instituted by the Board, and will still be in a position to file applications or press pending applications for any desired extensions.

This Court's intention to leave the *Pittsburgh & W. Va. Ry.* case, *supra*, intact and not to throw open public convenience and necessity cases for indiscriminate filings by stockholders merely on charges of "fraud and illegality", is demonstrated by the recent decision in *Schenley Distillers Corp.* v. *United States*, U. S. , 90 L. Ed. 217 (Jan. 2, 1946), reaffirming the *Pittsburgh & W. Va. Ry.* decision, distinguishing the *American Power & Light Co.* case, and holding that where "a party litigant asserts only its stockholder's derivative rights to have its subsidiary secure the permit" (the equivalent of a certificate of public convenience and necessity under the Act), it has no standing to obtain review.

In view of the Circuit Court's apparent misapprehension as to the effect of the recent decisions of this Court, and in view of the intolerable burden which would be placed on the Board if it were required to adjudicate countless private

intra-corporate disputes where mere stockholders charged the management with "fraud and illegality" and filed applications on behalf of the corporation, this Court is urged to correct the error of the Circuit Court's decree.

Question No. 3—As noted above, the Circuit Court held that Grace's various filings in this or other cases must be considered an application on behalf of Panagra if Grace could prove that Pan American "illegally and fraudulently" had prevented Panagra from filing such an application.

Such a conclusion is directly contrary to the theory on which the case was tried before the Board, and it is contrary to the position taken by all parties, including Grace (R. 92, 171), throughout the various steps of the proceeding. Moreover, it is contrary to the express finding of the Board —the expert agency charged with administration of the Act, and certainly the agency best qualified to ascertain what constitutes an application.

The Board specifically found that no application had been filed by or on behalf of Panagra (R. 10, 18), and the Circuit Court's failure to affirm that finding is in contravention of the established principle that administrative findings of fact are conclusive if supported by evidence, and that legal interpretations by an administrative agency will not be disturbed except for weighty reasons. *Brewster* v. *Gage*, 280 U. S. 327, 336 (1930); *Helvering* v. *Kehoe*, 309 U. S. 277, 279 (1940).

Section 401(b) of the Act [49 U. S. C., Sup. V, 481(b)] provides that "Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require." Pursuant to that provision of the Act, the Board has established

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regulations (Section 238.1) covering "applications for certificates of public convenience and necessity *or amendments thereof.*" A comparison of that regulation (quoted in the Appendix hereto) with any of Grace's filings in Docket 779 (or under Dockets 707 or 744—R. 314, 327) will demonstrate beyond question that, even if Grace were qualified to speak for Panagra, nothing resembling an application on behalf of Panagra has been filed. Moreover, an examination of that regulation [which, being promulgated pursuant to express statutory authority in the Act, is as binding as if part of the Act itself—*Atchison, T. & S. F. Ry.* v. *Scarlett*, 300 U. S. 471, 474 (1937)], will demonstrate that the Circuit Court is seriously in error in instructing the Board that a mere "consent" to a Section 401(h) extension proceeding "is the legal equivalent of a petition for the same extension initiated by the carrier." Moreover, nothing filed by Grace may be fairly considered a "consent" on behalf of Panagra.

The determination of what constitutes an "application" is specifically left by Congress to the Board (Section 401 (b), *supra*). Hence, it was error for the Circuit Court to instruct the Board to disregard its own regulations, and its own findings in this case, and to consider some "consent" (unidentified), filed in this case or some other proceeding, to be an application on behalf of Panagra.

Question No. 4—In addition to instructing the Board that Grace's filings *must* be considered an application if "fraud and illegality" are proved, the Circuit Court commanded (R. 373-374) the Board to decide such application as a part of Docket 779. This command constitutes an unwarranted interference with administrative discretion as to "the subordinate questions of procedure in ascertaining the public interest * * * the scope of the inquiry, whether applications should be heard contemporaneously or successively * * *

and similar questions." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940).

The Circuit Court's decree would have the effect of making *mandatory* a proceeding which the Board instituted "upon its own initiative" (R. 52), and therefore the decree is the equivalent of a mandamus to compel the Board to take action which "is regarded as involving the character of judgment or discretion," contrary to the principle established in *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543 (1937) and cases cited.

The Circuit Court's opinion (R. 430) seeks to justify this intrusion on the Board's discretion by referring to this Court's decision in *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. , 90 L. Ed. 119, 66 Sup. Ct. 148 (1946), and to a so-called "steady development in Supreme Court decisions of the doctrine that those seeking review of the orders of administrative agencies • • • are primarily vindicating the public, not a private, interest." Apparently, the Circuit Court felt that a part of such "steady development" was an overruling of the *Pottsville* case, *supra*, by the *Ashbacker* decision.

Plainly, the *Ashbacker* case is entirely consistent with the *Pottsville* case. In the *Ashbacker* case the Court held that, where *the administrative agency itself* had held that two applications were *mutually exclusive*, the granting of one without a hearing effectively denied the second applicant a hearing. The record in Docket 779 reveals not the slightest suggestion, let alone evidence, that any application exists which might foreclose the suggested extension of Panagra. The Circuit Court was able to say merely that "It is *not impossible*" that an extension of Panagra "might be frustrated by the intervening grants of licenses to other carriers" (R. 372-373).

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Thus, the Circuit Court seeks to extend the doctrine of the *Ashbacker* case from the situation where one application *clearly would* be foreclosed by the granting of another to the situation in this case where there is only the remote possibility, according to the Circuit Court, that such foreclosure might result. The vice of the Circuit Court's invasion of the administrative process is quite apparent in the fact that, having *created* an issue never suggested by any party, it found it necessary to base its ultimate decision either on a reference to material not in the record and not supporting that decision (R. 373), or on pure speculation (R. 431). It is hardly necessary to point out that the reference to material foreign to the record was improper. *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, 72 (1936); *National Labor Relations Board* v. *Newport News Co.,* 308 U. S. 241, 249-250 (1930).

Since the Circuit Court's invasion of the field of administrative discretion was based on a misunderstanding of this Court's decisions, such error should be corrected by this Court. The dangers of such an invasion are readily apparent. Docket 779 was tried on the theory, acquiesced in by all parties (R. 343), that no application had been filed on behalf of Panagra. It was also tried on the assumption that Grace's petitions under Dockets 707 and 744 were entirely separate and would be heard in separate proceedings (R. 361, 343). It was thus assumed that Pan American would have the opportunity under Docket 744 to establish the truth of its serious counter-charges against Grace—an opportunity which would be foreclosed if the Circuit Court's decree is allowed to stand, requiring the Board to treat Docket 779 as an "application" case if it finds that the charges made by Grace under Docket 744 are correct, regardless of the truth of Pan American's charges against Grace.

Because no Panagra application had been filed, Grace was treated as an intervenor in Docket 779, and thus had the opportunity to *cross-examine* Panagra's witnesses. If Grace had been considered as applicant on behalf of Panagra, it would not have had the right of cross-examination of Panagra's witnesses—certainly a substantial right. Hence, the record in Docket 779 cannot now be changed to a record in an "application" case without seriously prejudicing the rights of other parties.

Section 205(a) of the Act [49 U. S. C., Sup. V, 425] specifically authorizes the Board to establish such "procedure * * * as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act." And Section 1001 of the Act [49 U. S. C., Sup. V, 641] authorizes the Board to "conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice." Plainly the reviewing court should not be permitted to disrupt the procedure so established by the Board except on a showing that due process would otherwise be denied. In this case the exact reverse would be true: the revised procedure required by the Circuit Court's decree would deprive the parties of due process and would unwarrantedly interfere with administrative discretion.

CONCLUSION

From the foregoing it is apparent that the decision of the Circuit Court of Appeals raises important questions relating to the Civil Aeronautics Act of 1938, as amended, and the powers of the Board thereunder, which questions have not been decided by this Court. Such questions should be settled by this Court in the interest of orderly and just

administration of the Act. Furthermore, it is clear that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and from the proper scope of judicial review of decisions of the Board under the Act, as to call for supervision and correction by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

EASTERN AIR LINES, INC.
Petitioner,

By E. SMYTHE GAMBRELL,
Attorney for Petitioner.

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
Of Counsel.



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IN THE

Supreme Court of the United States

October Term, 1945

EASTERN AIR LINES, INC.,

Petitioner,

—VS.—

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, PAN AMERICAN AIRWAYS CORP., PAN AMERICAN AIRWAYS, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The Decision Below

The opinions of the Circuit Court of Appeals for the Second Circuit supporting the decree with respect to which review is sought here are reported in 154 F. (2d) 271. They are set forth in full in the printed Record (R. 351, 427).

In its decree, the Circuit Court set aside an order of the Civil Aeronautics Board ("the Board") in the Board's Docket 779 in which the Board held it had no power under the Civil Aeronautics Act of 1938 ("the Act") to compel

Pan American-Grace Airways, Inc. ("Panagra") to extend its system, presently confined to South and Central America, 1200 miles north from the Canal Zone to the United States, in the absence of an application by Panagra for such extension. No such application had been filed by Panagra because of a deadlock between its co-owners—Pan American Airways Corporation ("Pan American") and W. R. Grace & Co. ("Grace"), each of which owns 50% of Panagra's stock—Grace favoring such an extension and Pan American opposing it. The Circuit Court's opinions found, *arguendo*, that the Board was correct in holding that it could not *compel* such an extension, but in remanding the proceeding to the Board the Circuit Court directed the Board, in substance, that:

(1) If Pan American's opposition to the proposed extension of Panagra were the result of "fraud and illegality", then Grace's filings in Docket 779 or other proceedings constituted a "consent" on behalf of Panagra which should be considered the equivalent of an application for the extension; and

(2) If such an "application" were found to exist, the Board must proceed under Docket 779 to determine whether such application should be granted.

Grounds for Writ of Certiorari

The grounds for seeking a writ of certiorari are set forth in the annexed petition.

Statutory Provisions

The applicable statutory provisions are quoted in the Appendix to this petition and brief.

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Statement of the Case

The facts material to the consideration of the petition for writ of certiorari are set forth in full in the annexed petition, and will not be repeated here.

Errors to Be Urged

It is urged that the Circuit Court erred in the following respects:

(1) In deciding the case on review in reliance on an objection to the Board's order never raised before the Board or the Circuit Court and in direct opposition to the findings of the Board and the position taken by all parties throughout.

(2) In holding that a mere stockholder has standing under the Act to file a new route application on behalf of the corporation upon alleging that the corporation has failed to file such an application because of "fraud and illegality".

(3) In holding that some filing made by Grace in this or other proceedings constitutes an "application" on behalf of Panagra (provided the specified finding of "fraud and illegality" is made).

(4) In holding that the Board must consider and decide such an "application", if it exists, in Docket 779.

Summary of Argument

I. Under Section 1006 (e) of the Act, the reviewing court is prohibited from considering any objection "unless such objection shall have been urged" before the Board or

"unless there were reasonable grounds for failure to do so." Substantially the same rule is observed even in the absence of a statute reinforcing it. The objection on which the Circuit Court placed its decision was not presented to the Board, and no reasonable grounds have been advanced for failure to do so. Moreover, the objection was never raised before the Circuit Court, and the parties were never given a hearing on the point. Hence, it was error for the Circuit Court to decide the case on such objection.

II. It is settled law that one having *only* the interest of a shareholder in a corporation has no standing to obtain review of administrative decisions affecting the corporation, or to represent the corporation in public convenience and necessity cases. *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U. S. 479, 486-488 (1930); *Schenley Distillers Corp.* v. *United States,* U. S. , 90 L. Ed. 217, 66 Sup. Ct. 247 (January 2, 1946). This principle is not impaired by the decision in *American Power & Light Co.* v. *Securities & Exchange Commission,* 325 U. S. 385 (1945). It would be contrary to the purpose of the Act if the Board were required to depart from its function of considering *only* the *"public* interest" in order to arbitrate countless private intra-corporate disputes where stockholders claim the right to file new route applications on behalf of the corporation.

III. The Board specifically found, and all parties agreed throughout the proceeding before the Board and before the Circuit Court, that no application on behalf of Panagra had been filed for the extension involved. Nothing filed by Grace meets the statutory and administrative requirements for an application for new route authority. Hence, it was

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error for the Circuit Court to instruct the Board that anything presented by Grace could constitute an application in Docket 779.

IV. Decisions of this Court establish that an administrative agency is to be given full liberty to set up and follow its own rules and procedure as to the scope of proceedings, sequence of hearings, etc., except in the rare case where such rules and procedure would have the *certain* effect of depriving a party of the hearing to which he is entitled. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940); *Ashbacker Radio Corp.* v. *Federal Communications Comm'n*, 326 U. S. , 90 L. Ed. 119, 66 Sup. Ct. 148 (1945). Nothing in the record of this case suggests that the procedure adopted by the Board in this case will deprive either Grace or Panagra of a hearing on any legitimate application or complaint. Hence, the Circuit Court erred in ordering the Board to disrupt the orderly procedure established for hearing of this case and the hearing of other petitions and complaints; and such a disruption would deprive parties of important rights and due process of law.

ARGUMENT

I. *It Was Error for the Circuit Court on Review to Decide the Case on an Objection Never Presented to the Board.*

The Circuit Court has held that something filed by Grace, in this proceeding (Docket 779) or in Docket 707 or Docket 744 (which are not part of the record considered by the Circuit Court), constituted an "application" for a new route on behalf of Panagra provided that the Board should find that Pan American's opposition to such extension is based on "fraud and illegality". The suggestion that the Board should have considered such a possibility was never presented to the Board (or to the Circuit Court) at any time. Indeed, it is directly contrary to the position taken by all parties at all times (R. 343)—namely, that the sole question presented to the Board was whether the Board had the power, *in the absence of an application*, to extend Panagra's present route 1200 miles north from the Canal Zone to the United States. Yet the suggestion, raised for the first time by the Circuit Court itself, that the Board might have found an application to exist, forms the basis for the Circuit Court's reversal of the Board's decision.

It is a well established rule, even in the absence of a statutory provision reinforcing it, that a revewing court will not consider objections which were not presented to the administrative agency. *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 206 (1935); *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498 (1937); *Helvering* v. *Cement Investors*, 316 U. S. 527, 535 (1942). This rule is closely allied to the one requiring a party to exhaust all administrative remedies before seeking judicial review—a rule based on the principle that the expert administrative agency should first rule on all points within its field. *United States* v. *Abilene etc.*

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Ry., 265 U. S. 274 (1924); *Delaware etc. Co.* v. *United States*, 266 U. S. 438 (1925); *Beaumont etc. R. R.* v. *United States*, 282 U. S. 74, 87 (1930); *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50-52 (1938).

The usual rule forbidding consideration by the reviewing court of objections not raised before the administrative agency is greatly strengthened in this case by express statutory provision. Section 1006 (e) of the Act provides as follows:

> "No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

The language of this provision is clear on its face. Whatever power a reviewing court may have in cases where no similar statute is involved, plainly it has no power on review of a decision of the Board to raise *on its own motion* an objection not previously urged before the Board unless there were reasonable grounds for not urging such objection. Grace has advanced, and could advance, no reason for not having urged any available objection before the Board. Certainly Grace knew all of the facts, and it was not suffering from any disability or lack of adequate representation by counsel.

Similar statutory provisions have been accorded greatest deference by the courts. In *National Labor Relations Board* v. *Cheney California Lumber Co.*, U. S. , 90 L. Ed. 572, 574-575 (February 25, 1946), this Court had the following to say concerning Section 10 (e) of the National Labor Relations Act:

"A limitation which Congress has placed upon the power of courts to review orders of the Labor Board is decisive of this case. Section 10 (e) of the Act commands that 'No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.' We have heretofore had occasion to respect this explicit direction of Congress. *Marshall Field & Co.* v. *National Labor Relations Bd.*, 318 U. S. 253, 87 L. Ed. 744, 63 S. Ct. 585, and see *May Dept. Stores Co.* v. *National Labor Relations Bd.* decided December 10, 1945. By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested. Cf. *Pope* v. *United States*, 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16. We can say of this case, as was said of the *Marshall Field & Co. Case*, 318 U. S. 253, 87 L. Ed. 744, 63 S. Ct. 585, supra, that it 'gives emphasis to the salutary policy adopted by §10 (e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order.' • • • Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was therefore not within the power of the court below to make the deletion it made."

In *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 255-256 (1943), this Court said:

"We do not find that, at any stage of the proceedings before the Board, the objection now urged as to

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the Board's lack of power was presented to it or to any member or agent of the Board, or that there are any 'extraordinary circumstances' which would excuse such failure.

"Paragraph 2 (b) of the Board's order is in substance the recommendation of the intermediate report of the trial examiner. Yet petitioner's only objection to this part of the examiner's report was that the examiner had erred 'in making each and every recommendation'. Such a general objection did not apprise the Board that petitioner intended to press the question now presented, and may well account for the Board's failure to consider this question in its decision and to make findings with respect to it."

See also *United States* v. *Pierce Auto Freight Lines*, U. S. , 90 L. Ed. 629, 635, 66 Sup. Ct. 687 (March 11, 1946).

A similar statutory limitation on review is Section 24 (a) of the Public Utility Holding Company Act of 1935, concerning which the Circuit Court of Appeals for the Sixth Circuit had the following to say in *Todd* v. *Securities & Exchange Commission*, 137 F. (2d) 475, 477, 478 (C. C. A. 6th, 1943):

"Section 24 (a) requires as a condition precedent to the right to review an order of the Commission that the objections made shall have been urged before the Commission or that there were 'reasonable grounds for failure to do so.' * * * Under Section 24 (a) * * * consideration is forbidden of certain points raised here for the first time, such as that dissolution of the System cannot presently be made in advance of decision by the Commission as to action required of the subsidiary companies, or that the order is vague and

> uncertain • • • Since the Commission is not empowered to rule upon the constitutionality of statutes, the fact that the constitutional objections were not raised before it, as a matter of abstract justice perhaps should not preclude the assertion of such questions in this court. But the wording of Section 24 (a) is inclusive enough to embrace every kind of question, whether of law or fact. The Commission was established by congressional enactment, and the right to review its order likewise is given by Congress. Conditions under which the right may be exercised are within the power of the Congress to define, and one condition is that any question relied on in this court must have been urged before the Commission. We conclude that the constitutional questions are not before us."

It would seem obvious that, if questions which could not be decided by the administrative agency are nevertheless beyond the power of the court to review where they have not been presented to the agency, the question on which the Circuit Court based its decision in this case could not properly be considered on review. The Board had full power to decide whether anything filed by Grace could be considered an application on behalf of Panagra, as recognized by the Circuit Court in remanding the proceeding for that very purpose. As the court said in *American Power & Light Co.* v. *Securities & Exchange Commission*, 141 F. (2d) 606, 612-613 (C. C. A. 1st, 1944): "there can be no doubt that under §24 (a) petitioners were obliged to raise before the Commission issues as to the Commission's statutory authority to issue the contemplated orders."

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The Court's attention is also called to the following additional decisions relating to statutory provisions similar to Section 1006 (e) of the Act: *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 597 (C. C. A. 9th, 1943); *National Labor Relations Board* v. *Elvine Knitting Mills*, 138 F. (2d) 633, 634 (C. C. A. 2d, 1943); see also *Armour & Co.* v. *Brown*, 137 F. (2d) 233, 239 (Emergency Court of Appeals, 1943).

In its opinion on petitions for rehearing the Circuit Court apparently sought to justify its action in this case with the following statement (R. 429):

> "Grace, before the Board, objected to the dismissal of the proceeding for want of jurisdiction in the Board; in its petition for review Grace prayed 'for such other relief as to the court may seem just and proper in the circumstances.'"

It is obvious that a mere general objection to the Board's action does not meet the requirements of Section 1006 (e). As this Court said in the *Marshall Field & Co.* case, *supra*, 318 U. S. 253, 255-256:

> "Such a general objection [that the examiner had erred 'in making each and every recommendation'] did not apprise the Board that petitioner intended to press the question now presented, and may well account for the Board's failure to consider this question in its decision and to make findings with respect to it."

Similarly, in the *American Power & Light Co.* case, *supra*, 141 F. (2d) 606, 612-613, the court rejected as insufficient under Section 24 (a) of the Public Utility Holding Company Act a general reservation by the petitioner of the

"right to full judicial review of the said findings, opinion and order."

Section 1006 (e) of the Act would be rendered nugatory if a mere general objection were sufficient to raise the specific objection on which the Circuit Court's decision is predicated. The Circuit Court advances the theory (R. 429) that Grace's failure to raise the objection before the Board should be excused because "this is not mere private litigation" and "in court review of such administrative orders as this now before us, the public interest looms large." Yet it must be observed that Congress put the limitation on review in *a statute which deals with nothing but* the "*public* interest" and the "*public* convenience and necessity" (See Section 2 of the Act which defines the entire purpose of the Act in terms of those two phrases). In such a setting, it is plain that Congress intended that Section 1006 (e) should mean exactly what it says, and should not be avoided by every petitioner seeking review on the theory that he is "vindicating the public interest."

Finally, it is worthy of note that, not only was the objection not raised before the Board, it was not raised before the Circuit Court, and it was never suggested until after briefs and arguments had been presented. No hearing was granted on the point which finally was decisive in the Circuit Court's decision. Since the Circuit Court's theory was directly contrary to the position taken by Grace throughout the proceeding and on appeal (R. 92, 171), naturally the parties did not present argument on the subject, and they were never given an adequate opportunity to point out the fallacy in the Circuit Court's theory until after the decision had been reached. We submit that it is not the function of a reviewing court, in the very limited type of review authorized by Congress under the Act, to

originate arguments not advanced by counsel and directly contrary to the position of all parties and the Board throughout all stages of the proceeding. Moreover, such procedure on the part of the court deprives the parties of the fair hearing to which they are entitled in both administrative and judicial proceedings. *Morgan* v. *United States*, 304 U. S. 1, 18 (1938).

II. *Grace Has No Standing to File a New Route Application on Behalf of Panagra or to Represent Panagra in This Proceeding.*

The Circuit Court's conclusion that something Grace has filed must be considered an "application" on behalf of Panagra if the inability of Panagra to file is due to "fraud and illegality" rests on the novel proposition that a mere stockholder has the right to represent the corporation before an administrative agency and *force the corporation to expand its business or extend its routes* if he can prove that the corporate management was prevented by improper influences from taking such action. This is the first case in which it has been suggested that a stockholder could appear initially before the administrative agency with a new route application.

It has been considered settled that a person having no interest other than that of a stockholder cannot speak for the corporation in attacking an administrative order. In *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486-488 (1930), this Court said:

> "The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholders' interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order."

The Circuit Court's opinion recognized (R. 370) that the *Pittsburgh & W. Va. Ry.* case "might" be conclusive in this case "were it not for the decision" in *American Power & Light Co.* v. *Securities & Exchange Commission*, 325 U. S. 385 (1945). The latter decision appears to establish that if a stockholder can prove that he has a *special* interest, apart and distinct from the interest of the corporation, or that something alleged to be *actively detrimental* to the corporation is about to be done, because of the illegal and fraudulent action or inaction of the corporation's management, he may appear in defense of his own interests. In this connection, it must be remembered that the Securities & Exchange Commission is charged by the Public Utility Holding Company Act of 1935, under which the *American Power & Light Co.* case was decided, with the task of protecting "investors" as well as the public generally.

We do not believe that it was the intention of the Supreme Court in deciding the *American Power & Light Co.* case to throw open all administrative proceedings to applications, interventions, etc. by innumerable stockholders claiming that the managements of their respective corporations are improperly withholding action on the stockholders' pet projects. That such was not the intention of this Court, and that the *Pittsburgh & W. Va. Ry.* case is not basically modified, is clearly indicated by the decision of this Court in *Schenley Distillers Corp.* v. *United States*, U. S. , 90 L. Ed. 217, 66 Sup. Ct. 247 (January 2, 1946), where the Court said:

> "The district court rightly held that the parent corporation had no standing to sue. It did not ask that a permit be issued to it, and its sole interest in the permit sought for its co-appellant was that of a stockholder. We have held that a minority stockholder of a carrier

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corporation cannot bring suit to set aside a commission order against the corporation. *Pittsburgh & W. V. R. Co.* v. *United States*, 281 U. S. 479, 486-488, 74 L. Ed. 980, 983, 984, 50 S. Ct. 378. A parent corporation which by its stock ownership controls its subsidiary, and which as a party litigant asserts only its stockholder's derivative rights to have its subsidiary secure the permit, cf. *American Power & L. Co.* v. *Securities & Exchange Commission*, 325 U. S. 385, 389, 89 L. Ed. (Adv. 1179, 1180), 65 S. Ct. 1254, is even less aggrieved by the commission's order denying the permit than would be a minority stockholder."

Thus, it appears to be still the law that one having only the interest of a stockholder in the welfare of the corporation has no standing to represent the corporation in administrative proceedings. And that principle has been affirmed in a case quite close to the present case—one in which the stockholder is intervening in an effort to obtain for the corporation a permit or certificate of public convenience and necessity.

In this case Grace has no possible interest separate and apart from that of the corporation of which it is a shareholder. No active harm is threatened as regards either Grace or Panagra. Nothing is to be taken away from either as a result of the Board's order, and they remain, as they always have been, free to file any applications, petitions or other documents, and Grace is free to press for hearing on its petition under Docket 707 and its complaint under Docket 744. Indeed, Grace might have pressed those matters at any time, but it chose to rely on the proceeding under Docket 779 which the Board started "on its own initiative."

The Circuit Court has stressed (R. 429) the fact that the *public* interest is of paramount importance under the Act. This is true, to the point that there is not the slightest

suggestion in the Act that the Board is expected to arbitrate or attempt to compose private intra-corporate disputes among stockholders, and it is clear that the Board's functions in behalf of the public interest are not to be frustrated by the necessity for determining in the many new route proceedings which come before it what stockholder interest is entitled to "speak for" the corporations involved.

III. *The Board Has Correctly Found and All Parties Have Conceded That No Application Has Been Filed on Behalf of Panagra for the Route Extension Under Consideration in Docket 779.*

The Circuit Court's opinions direct the Board to ascertain whether an application for the Canal Zone-Florida extension has been filed on behalf of Panagra (R. 373), but the Court has seriously restricted the Board's discretion in determining whether such an application exists. The opinions instruct the Board (R. 371) that "this proceeding should be regarded as a voluntary application for the extension" if "fraud and illegality" are found in Pan American's opposition, and that (R. 431) a mere "consent by a carrier to a 401 (h) extension proceeding begun by the Board is the legal equivalent of a petition for the same extension initiated by the carrier."

The sole power to determine what constitutes an application has been delegated by Congress to the Board. Section 401 (b) of the Act provides as follows:

> "Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the authority shall by regulation require."

Pursuant to that authorization, the Board has adopted regulations (Section 238.1—see portions quoted in Appendix hereto) specifying the form and contents of "applications for certificates of public convenience and necessity *or amendments thereof.*" Nothing which Grace has filed in this case or in Dockets 707 and 744 complies with the requirements of the Board's regulations. It is clear that a reviewing court has no power to disregard or overrule appropriate administrative regulations promulgated in compliance with statutory duty. As this Court said in *Atchison, T. & S. F. Ry.* v. *Scarlett,* 300 U. S. 471, 474 (1937):

> "The regulation having been made by the Commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute."

The Circuit Court's ruling that a mere "consent" is the legal equivalent of an application flies in the face of regulations which are as binding as if enacted by Congress itself. As a matter of fact, nothing filed by Grace in this case could properly be designated a "consent" on behalf of Panagra.

The Board, which is best qualified to determine what constitutes an application, specifically found that no application had been filed on behalf of Panagra, referring at least twice to the "absence of an application from Panagra" (R. 10, 18). Legal interpretations and findings of fact by an administrative agency are entitled to greatest weight. *Brewster* v. *Gage,* 280 U. S. 327, 336 (1930); *Helvering* v. *Kehoe,* 309 U. S. 277, 279 (1940). As this Court said in *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218, 227 (1943):

"The review provisions were patterned after those by which Congress has provided for the review of 'quasi-judicial' orders of the Federal Trade Commission and other agencies, which we have many times had occasion to construe. Under such provisions we have repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. *Federal Trade Comm'n* v. *Education Society*, 302 U. S. 112, 117; *Gray* v. *Powell*, 314 U. S. 402, 412; *Labor Board* v. *Link Belt Co.*, 311 U. S. 584, 597; see *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141, 144. *These considerations are especially appropriate where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged*" (Italics supplied).

Even if it were not clear that the Board considered the matter and made a finding that no application had been filed on behalf of Panagra, it is to be assumed in the absence of proof to the contrary that the Board did its duty, for "there can be no presumption that the Commission disregarded the public or any other interest." *United States* v. *Pierce Auto Freight Lines, supra*, 90 L. Ed. 629, 638.

Moreover, it was universally conceded by the parties throughout the proceeding that no application on behalf of Panagra was pending. Grace conceded that fact both in its petition for reconsideration filed with the Board (R. 92) and in its petition for review filed with the Circuit Court (R. 171).

In the light of the specific regulations defining "applications", the findings of the Board that no application had been filed on behalf of Panagra, and the universal agree-

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ment of the parties, including Grace, that there was no such application, it is submitted that the Circuit Court stepped beyond its function when it instructed the Board that a mere "consent" could be an application, and that an application is involved in this case if Pan American is guilty of "fraud and illegality".

IV. *The Circuit Court Erred in Requiring the Board to Consider and Decide in Docket 779 Any Application On Behalf of Panagra Which Might Be Found to Exist.*

It has previously been demonstrated that no application on behalf of Panagra for the suggested extension is pending in this or any other proceeding. But even if such an application could be supposed to exist, it is clear that the Circuit Court overstepped the bounds of permissible review by ordering the Board to consider and decide such an application *in Docket 779*.

Section 205 (a) of the Act specifically authorizes the Board "to make and amend such general or special rules, regulations, and procedure • • • as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act." Section 1001 further authorizes the Board to "conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice." Clearly the Act contemplates a broad range of discretion in the Board as to the procedure to be followed.

This Court has repeatedly emphasized that administrative discretion as to procedure must be left unfettered so long as it does not seriously infringe due process. In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940), the Court said:

> "• • • the subordinate questions of procedure in ascertaining the public interest, when the Commission's li-

> censing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interests."

In that case this Court specifically refused to do what the Circuit Court sought to do in this case—order the administrative agency to disrupt its established procedure and to decide an application on the record already made.

The reasoning of the *Pottsville* decision applies to this case with greatest force. Although Grace had previously filed its petition under Docket 707 and its complaint under Docket 744, the Board chose to institute an investigation "upon its own initiative" under Docket 779. Grace never objected to such procedure, and never pressed for hearing on Dockets 707 and 744. The Board and all parties have at all times considered Docket 779 to be a purely voluntary investigation, unrelated to the other proceedings instituted by Grace except to the extent that some of the factual issues might overlap. The action of the Circuit Court would have the effect of converting a discretionary proceeding into a mandatory one. It is clear that a court may not so compel an administrative agency to take action which "is regarded as involving the character of judgment or discretion." *Cf. United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 543 (1937) and cases cited.

The Circuit Court's opinions rely on *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U. S. , 90 L. Ed. 119, 66 Sup. Ct. 148 (December 3, 1945) to justify the judicial intrusion on the Board's discretion

as to the order of procedure. That case involved a situation where *the administrative agency itself* had held that two applications were *mutually exclusive.* The Court held that, under such circumstances, the granting of one application without a hearing effectively denied the second applicant of a hearing.

No such facts exist in this record, and the Circuit Court's decision appears to be based solely on speculation with respect to this point. As the Circuit Court said (R. 372):

> "*It is not impossible* that should the Board much longer delay, and then decide that the extension should be granted to Panagra, its action *might* be frustrated by the intervening grants of licenses to other carriers" (Italics added).

In support of that thesis the Circuit Court quoted at length (R. 373) *material not in the record* which shows simply that another proceeding involving the same general area is pending before the Board. Such material certainly does not demonstrate that the suggested Panagra extension would or even might be foreclosed by another proceeding. Moreover, if such material were to be considered, it should also be noted that both Grace and Panagra were parties to the other proceeding and were given full hearing, and consequently occupy a quite different status from that of the Ashbacker Company. But of course the Circuit Court could not properly consider facts outside the record. *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, 72 (1936); *National Labor Relations Board* v. *Newport News Co.,* 308 U. S. 241, 249-250 (1939); *National Labor Relations Board* v. *Crown Can Co.,* 138 F. (2d) 263, 267 (C. C. A. 8th, 1943). In its opinion on petitions for rehearing (R. 431) the Circuit Court denied that it had relied in any way on such facts,

and therefore it is clear that the decision rests ultimately on the Circuit Court's unsupported conjecture that the granting of other applications in the area *might* foreclose the suggested extension for Panagra.

It is submitted that this Court did not intend the *Ashbacker* decision to be so extended as to stultify the administrative process. If the remote possibility that one application might be foreclosed by the granting of others were to be considered sufficient to require preferred or consolidated hearings, the Board's work would never be done, for new applications are being filed every day. Many old applications are still pending for the reason that the applicants have not sought hearing, or have deliberately requested delay. Such is the case with Grace, for it has relied on the proceeding under Docket 779, and has not sought hearing on Dockets 707 and 744. As a matter of fact, Grace vigorously opposed consolidation of Docket 779 with applications by other parties (R. 420-421).

It is submitted that the *Pottsville* decision is still the law, and that the *Ashbacker* case simply represents one of the rare and extreme cases where *certainty* of injury to a party will cause the reviewing court to interfere with the administrative discretion as to procedure. The remote possibility of injury conjured up by the Circuit Court clearly will not support such interference.

Two points should be noted as illustrative of the harm which would result from the Circuit Court's interference with the Board's procedure. Because no application on behalf of Panagra was considered to be involved in Docket 779, Grace, which was sponsoring the suggested extension of Panagra's route, occupied the position of an intervenor, and was given the opportunity to cross-examine the witnesses representing Panagra. If Grace had been considered an applicant on behalf of Panagra, it would not have had

that right—certainly a substantial one. Hence, the record in Docket 779 would be seriously prejudicial to other parties if it were now to be used to decide a supposed "application" filed by Grace. Procedural defects of this nature are essentially prejudicial. *Edwards* v. *United States*, 312 U. S. 473, 482 (1941).

Also, it should be observed that the Circuit Court has required the Board to determine under Docket 779 whether Pan American should be required to "cease and desist" from its opposition to Panagra's suggested extension (R. 428). Such relief is precisely that sought by Grace in Docket 744 (R. 328), to which Pan American has filed extensive and serious counter-charges against Grace (see Appendix II, pp. 468-470, to Pan American's petition and brief filed in this Court). The Board and all parties have assumed throughout that Docket 744, including Pan American's counter-charges, was to be considered separately. Grace vigorously insisted upon separation of the issues of Docket 744 from the issues of Docket 779 (R. 361). If the procedure now ordered by the Circuit Court were to be adopted by the Board, Grace's charges against Pan American would necessarily be heard in Docket 779, but Pan American's equally serious counter-charges would be deferred to another proceeding or perhaps eliminated entirely through dismissal of Docket 744; and Grace might receive the relief which it sought under Docket 744 while Pan American would obtain no relief and no hearing. Clearly the reviewing court should not so interfere with the Board's procedure where seriously prejudicial results to the parties are inevitable.

It follows that the Circuit Court's decree represents an unwarranted interference with the Board's discretion with respect to procedure.

Conclusion

In view of the foregoing considerations, it is respectfully requested that this Court grant the writ of certiorari sought in the petition annexed hereto, and that, upon review of the decision of the United States Circuit Court of Appeals for the Second Circuit, said decision be reversed, and the orders of the Civil Aeronautics Board involved herein be affirmed.

Respectfully submitted,

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Atlanta, Georgia,
May 24, 1946.

APPENDIX

Applicable Statutory Provisions
(Civil Aeronautics Act)

Section 205 (a) [49 U. S. C., Sup. V, 425]: "The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

Section 401 (a) [49 U. S. C., Sup. V, 481]: "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation * * *"

Section 401 (b): "Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require."

Section 401 (d) (1): "The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the pub-

lic convenience and necessity; otherwise such application shall be denied."

Section 401 (h): "The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate * * *"

Section 1001 [49 U. S. C., Sup. V, 641]: "The Authority may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice."

Section 1002 (b) [49 U. S. C., Sup. V, 642]: "The Authority is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is authorized to be made to or before the Authority by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint."

Section 1006 (a) [49 U. S. C., Sup. V, 646]: "Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in

section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order."

Section 1006 (e): "The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Section 1006 (f): "The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code."

Section 238.1 of Economic Regulations of the Civil Aeronautics Board

"Applications for Certificates of Public Convenience and Necessity—(a) Formal Requirements of Applications. Applications for certificates of public convenience and necessity or amendments thereof, shall meet the requirements set forth in §285.3 of the Economic Regulations as to (1) execution, number of copies and service; (2) verification; and (3) formal specifications of papers.

* * * * *

"(d) General Provisions Concerning Contents. The statements contained in an application shall be restricted

to significant and relevant facts. They shall be free from argumentation or from expressions of opinion, except such as may be required by this Regulation.

• • • • •

"Each application shall give full and adequate information with respect to each of the items set forth in this paragraph. In addition, the application may contain such other information and data as the applicant shall deem necessary or appropriate in order to acquaint the Board fully with the particular circumstances of its case. Among other things, every such application shall contain the following information:

"(1) The full name and address of the applicant, the nature of its organization (individual, partnership, corporation, etc.) and the name of the State under the laws of which it is organized.

"(2) A statement that the applicant is a citizen of the United States, as defined by section 1 (13) of the Act. It is not required that the application shall contain all the evidence which the applicant is prepared to present at the hearing or otherwise in support of such statement, but the application shall at least indicate the nature and result of its investigation in that matter and the character of the evidence it will be prepared to present in support of citizenship.

"(3) An adequate identification of each route for which a certificate is desired, specifying the type or types of service (mail, passengers, and property) to be rendered on each route, and whether or not such services are to be rendered in scheduled operations. The identification of each

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route shall name every terminal and intermediate point to be included in the certificate for which application is made.

"(4) A map (which may be attached as an exhibit) drawn approximately to scale showing all terminal and intermediate points to be served, giving the approximate mileages between all adjacent points, and the principal over-all distances.

"(5) A statement as to the type of aircraft applicant proposes to use in the new service and whether such aircraft is presently owned by the applicant."

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JUN 7 1946
CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM—1945 4 – 5

NOS. ~~1251, 1258~~ ~~114 + 119~~

PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., and EASTERN AIR LINES, INC.,

Petitioners,

against

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

BRIEF OF W. R. GRACE & CO., RESPONDENT, IN OPPOSITION TO PETITIONS OF PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC. AND EASTERN AIR LINES, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN T. CAHILL,
Attorney for W. R. Grace & Co.

FRED J. KNAUER,
JOHN P. MOORE,
Of Counsel.

June 7, 1946.



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Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 1251, 1258

PAN AMERICAN AIRWAYS CORPORATION, PAN AMERICAN AIRWAYS, INC., and EASTERN AIR LINES, INC.,

Petitioners,

against

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

BRIEF OF W. R. GRACE & CO. IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

Statement.

This brief is submitted in opposition to petitions for writ of certiorari to review a judgment and decree of the Circuit Court of Appeals for the Second Circuit by Judges LEARNED HAND, SWAN and FRANK, entered upon an opinion written by Judge FRANK. The decision reversed an order of the Civil Aeronautics Board which dismissed for lack of jurisdiction a proceeding concerning the extension of Panagra's route from the Panama Canal to the United States (Docket 779). The court remanded the case to the Board for further proceedings. Petitions have been filed by Pan American Airways Corporation (hereinafter called Pan American),

Pan American Airways, Inc., and Eastern Air Lines, Inc. (hereinafter called Eastern), but not by the Civil Aeronautics Board.

Panagra (Pan American-Grace Airways, Inc.) is the only American air carrier in the international field without a United States terminal. A pioneer of international aviation, it has since 1929 operated a route from the Canal Zone south along the West Coast of South America and across the Andes to Buenos Aires. The route, which commenced as a 600 mile operation between Lima and Talara in Peru, now is a trunk line of over 8,800 route miles, serving nine countries of Latin America and the Canal Zone (R. 34).*

Pan American and W. R. Grace & Co. (hereinafter called Grace) each owns 50% of its stock, and each is represented on Panagra's Board of Directors by four directors.

About 75% of the traffic which Panagra handles at the Canal originates in or is destined to the United States (R. 111). Panagra has from its inception been dependent upon a connecting service between the Canal Zone and the United States. For these reasons Grace has long sought to have Panagra's route extended from the Canal Zone to a terminal in the United States (B. R. 1196-7).

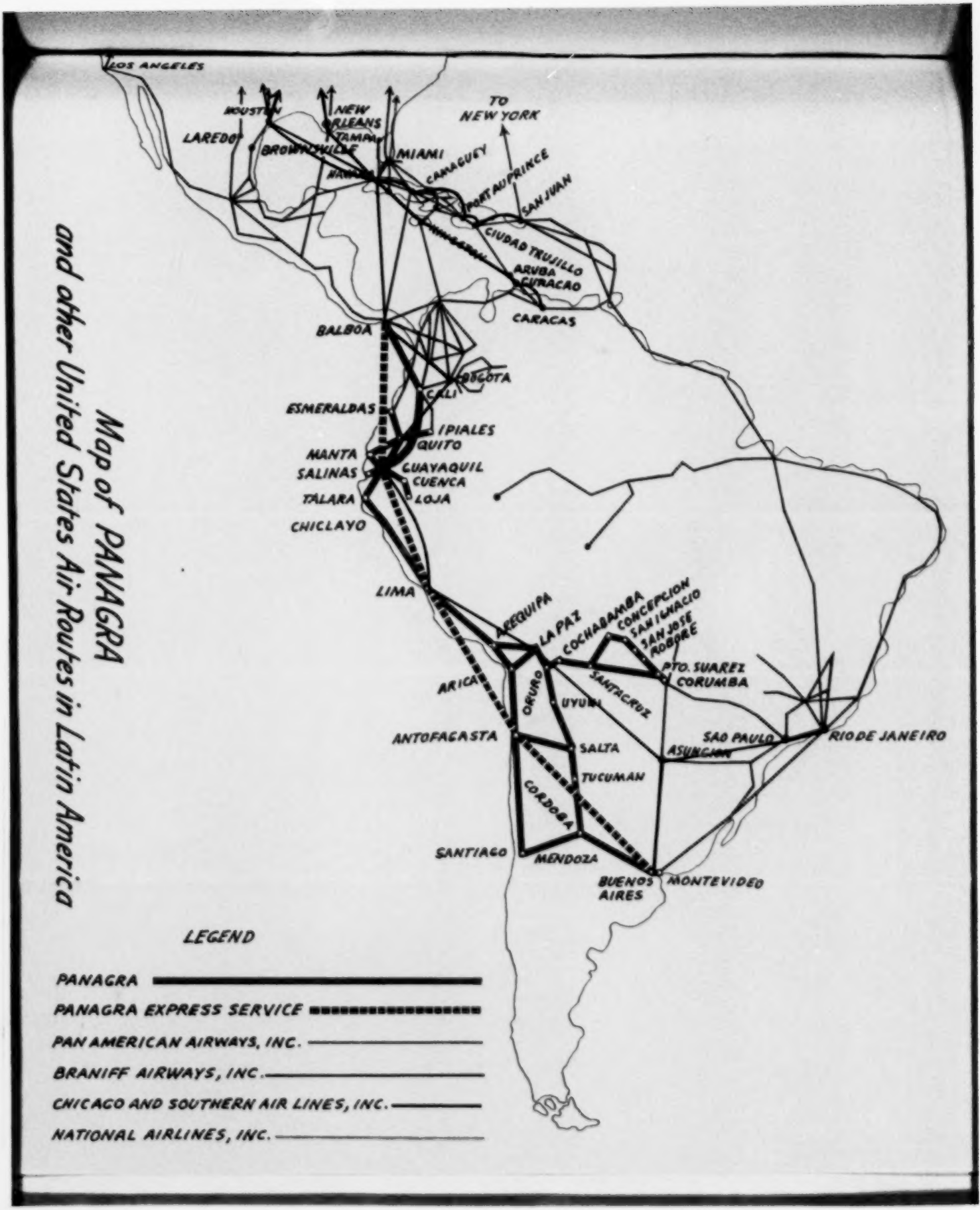
Pan American's 100% owned subsidiary, Pan American Airways, Inc., operates this connecting service. It has enjoyed a monopoly of the traffic between the United States and the Canal Zone, by virtue of its route between Miami and the Canal Zone, as well as routes between the United

* For convenience we have adopted the petitioners' method of referring to the printed record on petitions for certiorari as (R. —), to the complete record before the Civil Aeronautics Board as (B. R. —) and to Pan American's Appendix II to its Petition and Brief as (App. II —).

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States and the Canal Zone via Central America (B. R. 6772-6).

Further, Pan American Airways, Inc. also has a route between the United States and Buenos Aires via the *East* Coast of South America (see map attached). Pan American has been able to suppress the full development of Panagra's competition to Buenos Aires (via the *West* Coast) by keeping Panagra dependent for its connections with the United States upon a connecting service to the Canal. At best a connecting service is a poor substitute for a through service—when operated by one's competitor it is well below that.

All attempts to have Panagra file an application with the Civil Aeronautics Board for an extension of its route to a United States terminal have been blocked by Pan American. *Acting upon express instructions of Pan American,* admittedly motivated by its self-interest in preventing competition by Panagra (*infra,* pp. 8-9), Pan American's representatives on Panagra's Board of Directors successfully stymied all proposals to have Panagra apply, even absenting themselves from meetings of Panagra's Board of Directors called to consider such an application (R. 149-152).

In the meantime, Pan American has continued greatly to expand its own routes, and has sought United States terminals for its various affiliates—except Panagra (B. R. 278).*

Because of this situation, Grace finally filed a petition with the Civil Aeronautics Board in December, 1941 (Docket

* Dockets 800 and 1992, applications of *Compania Mexicana de Aviacion, S. A.,* for service from Mexico to points in Texas, filed Oct. 13, 1942 and Aug. 6, 1945; Docket 841, application of *Panair do Brasil, S. A.,* to operate from Brazil to Miami, filed Feb. 1, 1943; Docket 1887, application of *Compania Cubana de Aviacion, S. A.,* to operate from Cuba to Miami, foreign air carrier permit granted March 15, 1946, C. A. B. Order Serial No. 4633.

707).* This brought the matter to the Board's attention by requesting that it extend Panagra's route to the United States (App. II, 351-371).

Following the entry of the United States into the war, the effect on the public interest by the enforced throttling of Panagra at the Canal became even more serious.† Grace filed a further petition with the Board on April 27, 1942 (Docket 744). It requested an order by the Board, pursuant to §§ 18 and 21 of the Clayton Act and § 411 of the Civil Aeronautics Act, directing that Pan American cease and desist from its unfair practices in opposing the filing of an extension application by Panagra, and it further requested an order that Pan American divest itself of its ownership of Panagra stock "to such extent as may be necessary to divest itself of its present negative control of Pan American-Grace Airways" (App. II, 372-393).

After Pearl Harbor, the Board suspended action on all proceedings involving additional air service. However, in September, 1942, the Board, after referring to Grace's petitions and the charges made therein, instituted this proceeding (Docket 779) to investigate whether the public convenience and necessity required the extension of Panagra's route to a terminal in the United States (R. 50-2, 53-5). Panagra, Grace and Pan American Airways, Inc. were made parties to this proceeding. Shortly thereafter, Pan American Airways Corporation was permitted to inter-

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* Pan American's petition (p. 5) insinuates that there was something improper about Grace placing the matter before the appropriate administrative agency, created with full authority under the Act for precisely this purpose, "Instead of going to arbitration or resorting to the courts * * *". At every stage of this controversy Grace has been met with contentions by Pan American that some other place, time or type of proceeding is more appropriate for a determination of this matter.

† Cf. *Caribbean Investigation*, 4 C. A. B. 199 (1943).

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vene, as were Eastern Air Lines and others (B. R. 112-114, 193-5).

There were six weeks of exhaustive hearings before the Examiners, covering all controversies between Pan American and Grace concerning Panagra (*infra*, pp. 26-28, and Appendix A). Thereafter the Board, on motion of Pan American, dismissed the proceeding for lack of jurisdiction (R. 31-47). This was on the ground that it did not have the power to *compel* this extension of Panagra, which, having itself filed no application, was regarded as not "willing".

Acting upon a petition to review filed by Grace, the Circuit Court of Appeals for the Second Circuit unanimously reversed that determination, and remanded the case to the Board for further proceedings (154 F. (2d) 271; R. 433-4). The court held that it was within the power, as well as the duty, of the Board to determine whether the action of Pan American in continually blocking the filing of an application by Panagra amounted to "fraud" or "illegality". If so, then the action of Pan American's representatives on the Panagra Board of Directors was to be disregarded, and Panagra was not to be considered as unwilling. Panagra would then be in the position of consenting to an extension, which the court held to be the legal equivalent of an application by Panagra (R. 368-374).

That is the decision sought to be reviewed.* It is one against fraud and illegality. If the Board finds that Pan American has been guilty thereof, Pan American is no longer to be permitted to profit by its own wrong.

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* Pan American erroneously transforms the Circuit Court's *arguendo* assumption of the correctness of the Board's decision on the question of compulsory extension (R. 369) into an actual decision by that court affirming the Board on that point (Pan Am. pet., p. 8).

The court's decision is intermediate, not final. It does not prejudge the questions of fraud or illegality. The proceeding is remanded to the Board to determine that issue. If Pan American can there demonstrate that its actions do not amount to fraud or illegality, then this Court need never be troubled with this case.

These petitions for certiorari are at least premature, when the administrative process has not yet been exhausted and no final judgment has been achieved.

In *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258 (1916), this Court, in explaining its denial of certiorari at an earlier stage of the litigation, stated:

> "And, except in extraordinary cases, the writ is not issued until final decree. * * * *The decree* that was sought to be reviewed by certiorari at complainant's instance *was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application;* * * *"*†

Cf. *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 384 (1893).

The real question presented by these petitions is: at this intermediate stage of the proceedings, should this Court upset the unanimous determination of the Circuit Court of Appeals that the Board had the power and the duty to determine whether Panagra's failure to apply for the extension was due to illegality or fraud on the part of Pan American, and, if it so found, to regard Panagra as consenting to an extension of its route to a United States terminal, made in the public interest.

That the public interest, which is the foundation of the entire Civil Aeronautics Act (see particularly § 2 thereof), requires the extension of Panagra's West Coast route to

† Emphasis ours throughout.

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the United States is now beyond argument. The Civil Aeronautics Board * has expressed this in clear terms as recently as May 22, 1946 in the opinion in the Latin American case (Docket 525 *et al.*, C. A. B. Order Serial No. 4793), as follows:

> "In addition, we have long recognized the desirability of an application to the Board which would permit a determination of the question of extending Pan American-Grace Airways from its present terminal at Balboa to a point in the United States. If such an extension were made to Miami or New York, or some other point on the eastern seaboard, the eastern part of the country would be afforded a fast direct service to the west coast of South America and to Buenos Aires.
>
> • • • • • • • • • •
>
> "In view of the facts above outlined we feel that the joint owners should in the public interest cooperatively enable Panagra to apply for access to the east coast of the United States" (pp. 63-4).

Grace respectfully stresses the urgency of an expeditious disposition of these petitions. Panagra has already been unduly prejudiced and injured as a result of Pan American's negative control. Further delay will, as the court below pointed out (R. 372), exclude Panagra from full participation in the rapidly developing field of international aviation, and may even doom it to extinction because of its inability to compete successfully with other American and foreign lines, which have the tremendous advantage of operating from United States terminals (see *infra*, pp. 29-30).

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* Under § 801 of the Civil Aeronautics Act the President has the final determination as to the issuance, denial and amendment of, and the terms and conditions in, any certificate authorizing an air carrier to engage in transportation outside of the United States. It has been held that his determination comes within the scope of Executive discretion and is not subject to review by the courts. *Pan American Airways* v. *Civil Aeronautics Board*, 121 F. (2d) 810 (C. C. A. 2d, 1941).

Prior Proceedings.

A. Background of the Institution of Docket 779.

Pan American has had a choice monopoly in the Florida-Canal Zone sector. Pan American has opposed Panagra's coming through to the United States for that reason.

The minutes of the Board of Directors of Pan American Airways, Inc. for December 28, 1938 state:

> "Mr. Trippe reported to the meeting on the status of negotiations with W. R. Grace & Co. It was the sense of the meeting that *it would not be in the interest of our stockholders* [Pan American Airways Corporation] for our directors to authorize an application by Pan American-Grace Airways, Inc. to extend north of Cristobal in competition with Pan American Airways, Inc." (R. 152).

This being the fact, we ignore the attempted justification advanced by Pan American, in its theory of a supposed dedication of capital by Panagra's stockholders to an enterprise forever limited to the West Coast of South America (Pan Am. pet., pp. 3-4). Irrelevant to the decision as to the extent of the Board's jurisdiction, it is obviously mentioned at this stage merely to divert attention from the crucial issue: Pan American's blocking of Panagra in order to maintain its own monopoly.*

"Grace again raised the extension issue" (Pan Am. pet., p. 5) in 1940 when Pan American and American Export

* Suffice it to say that Panagra's certificate of incorporation, permitting it to operate aircraft "as, when and where lawful," and to conduct its business in "the United States of America and in any or all foreign countries" (R. 153, 159) states its purposes and powers in the broadest possible terms, and is not to be negated by the provisions of any letter written during the course of preliminary negotiations prior to the formation of Panagra, and the terms of which were never followed (B. R. 1432-43).

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filed applications for a route between New Orleans and the Canal Zone.* Grace then urged Pan American to permit Panagra to apply for that route to give it a United States terminal (R. 149-51).

Pan American resisted all attempts by Grace to have this matter considered by the Board of Panagra (B. R. 4321-4347).

The minutes of Pan American's Executive Committee for January 14, 1941 contain a resolution:

> "* * * that the representatives of the Corporation upon the Board of Directors of Pan American-Grace Airways, Inc. should not attend the meeting of such Board of Directors called for the afternoon of January 14, 1941, to act upon such proposal [that Panagra apply for the U. S. terminal], or any adjournment thereof, and, except upon further instructions from the Executive Committee or the Board of Directors, *should not attend any other meeting of the Board of Directors of Pan American-Grace Airways, Inc. at which action is to be taken upon the subject matter above described*" (R. 150).†

Pan American excused that absence from the directors' meeting on the ground that this was really a question for the stockholders (B. R. 4323). Pan American then absented itself from the stockholders' meeting which it had caused to be called for the very purpose of considering the question (B. R. 4325).

When, therefore, Grace resorted to the filing of its petitions with the Civil Aeronautics Board in December, 1941 (Docket 707) and in April, 1942 (Docket 744), it was the

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* Pan American was later awarded this route. *Pan American Airways, et al., New Orleans-Guatemala.* 4 C. A. B. 161 (1943).

† These instructions of the Executive Committee, and a similar previous stand by Pan American's Board, were reaffirmed by Pan American's Board of Directors on July 1, 1941 (R. 150-151).

only alternative. Efforts by the Grace directors in all other directions had failed * (B. R. 3627-37).

B. Proceedings in the Panagra Terminal Investigation—Docket 779.

The Board's order of September 10, 1942 instituting this proceeding (Docket 779) on its own initiative refers to allegations in Grace's petitions in Dockets 707 and 744, and finds its action necessary in order to perform its duties under the Civil Aeronautics Act.† The order was stated to be pursuant to Titles II, IV and X of the Act, particularly § 401(h) (R. 52).‡

---

* Another diversion advanced in Pan American's petition (p. 5) is that offers of arbitration under the 1939 agreement were spurned by Grace. In November, 1941, Grace met this charge by Pan American in a written statement (B. R. 7174-5), in which it was said:

> "* * * we would call your attention to the fact that the agreement specifically provides that the questions to be arbitrated are those 'which cannot be settled by the Board of Panagra.' The action of your representatives who are directors of Panagra in refusing to attend meetings of Panagra called for the purpose of discussing the questions at issue has made impossible even an attempt by the Board of Panagra to dispose of these questions as directors of Panagra acting under their full legal responsibility as such and has thereby eliminated these questions from the arbitration clause of the agreement."

† The inter-relationship of Docket 779 with the prior petitions in Dockets 707 and 744 is developed in more detail, *infra*, pp. 26-28 and Appendix A.

‡ Title IV includes § 411. Title X contains § 1002 which, in subdivisions (a), (b) and (c), gives the Board the broadest possible power to investigate any complaint whatsoever, both with respect to any acts done, and to those omitted to be done, by any person in contravention of any provision of the Act. It also confers duties upon the Board to investigate the matters complained of. When the Board finds that any person has failed to comply with any provision of the Act or requirement established pursuant thereto, the Board *shall* issue an appropriate order to compel such person to comply therewith.

Title II of the Act includes § 205(a), which empowers the Board to perform such acts, conduct such investigations, issue such orders, and make such rules as it shall deem necessary to carry out the provisions of the Act and to perform its duties thereunder.

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In six weeks of hearings before the Board's Examiners in September and October of 1943, testimony in excess of 3,400 pages was compiled. Approximately 500 exhibits, many of them voluminous, were received.

Panagra was relegated to what might be called a position of neutrality. The Pan American representatives on Panagra's Board blocked the employment of independent counsel to represent Panagra, by insisting that counsel be approved only for the limited purpose of making available all required information, and not for the purpose of taking any position on the merits (R. 122-141). Thereafter Panagra was theoretically represented by one Grace and one Pan American representative on the Panagra Board. It took no active part in the proceedings.

That Panagra was not, however, the completely disembodied spirit which Pan American would have it, was apparent from the fact that all of its executives directly engaged in the conduct of its operations, including its president, two vice-presidents and traffic representative, testified strongly in favor of the extension (B. R. 386-7, 521-2, 802, 1154-6),* as did the four Panagra directors nominated by Grace.

At the close of the hearings Pan American renewed its previous motion to dismiss the proceeding on the ground that § 401(h) did not "authorize the Board to require a carrier to operate in a different territory from that specified in its certificate" (R. 60).

Grace's cross-motion (R. 66-9), requesting that argument on the jurisdictional question be deferred until final argument on the merits, was denied by the Board (R. 49).

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* Pan American prevented these witnesses from testifying as Panagra officials, but they testified as individuals (B. R. 358-9, 512-13, 521-2, 860).

Oral argument on the motion to dismiss was heard on January 31, 1944 (B. R. 8406-8577), and on May 24th the Board issued its opinion and order granting Pan American's motion and dismissing the proceeding (R. 31-47).

Grace filed a petition for reargument and reconsideration on June 22, 1944, urging that the Board's action was erroneous, and requesting the Board to withdraw its order and remand the case to the Examiners for a report on the facts (R. 84-106). Grace's petition for reargument was denied without opinion by order of the Board dated August 5, 1944 (R. 48). These two orders, as well as the order denying Grace's cross-motion above mentioned, were the orders brought before the Circuit Court of Appeals by Grace's petition to review (R. 164-176).

C. Decision of the Civil Aeronautics Board.

Pan American's motion was, in effect, a demurrer raising the issue whether § 401(h) authorized the Board *in any case* ever "to require a carrier to operate in a different territory from that specified in its certificate" (R. 60; see App. II, 161-7). This issue was resolved in the affirmative by the Board's holding that:

> "• • • this section of the Act *does* authorize the Board to add new points or services to the certificate of a carrier on the Board's own initiative and without an application by, and the consent of the carrier;" (R. 38).

The Board went on to state that this power was not unlimited:

> "but this authority does not include the addition of new service which would be so extensive as to amount to a new air transportation route, or of such a kind to substantially change the character of a carrier's system" (R. 38-9).

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It adopted, at least in theory, as the test of the extent of its power to compel extensions under §401(h), the conclusion of Justices CARDOZO, BRANDEIS and STONE in *Interstate Commerce Commission* v. *Oregon-Washington Railway & Navigation Co.*, 288 U. S. 14 (1933), that each situation was to be tested by the standard of reasonableness under the circumstances.*

The Board had thus answered the "pure question of law" presented by Pan American's motion to dismiss.† However, it went on in the same decision to give judgment on the facts that this *particular* extension was beyond its jurisdiction, although the facts concerning this particular extension had never been briefed or argued before it, nor had there been an Examiners' report thereon.

The Board's decision was that the proposed extension was not "an alteration, amendment or modification of its certificate within the meaning of §401(h) of the Act in the sense that the Board could compel such an extension in the absence of an application from Panagra" (R. 47). The Board held that this extension would transform Panagra's character (R. 46-7). The three reasons assigned for this conclusion were that the extension would:

(1) give Panagra direct access to the traffic gateways of the United States, instead of relying on a connecting service;

(2) add some 1200 miles to Panagra's 8800 route miles; and

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* Actually it did not *apply* that test here, because a determination of the issue of reasonableness would have required an argument on and consideration of all the facts, which the Board never gave.

† Pan American's counsel so characterized the question in his argument before the Board (R. 80).

(3) require additional capital investment by Panagra of about $800,000, compared with Panagra's gross assets at the end of 1942 of $10,700,000 and its net worth at that time, exclusive of good will, of over $3,000,000.

The errors in this conclusion were discussed in Grace's briefs before the Circuit Court of Appeals to which reference is here made (App. II, 149-58).

D. Rulings and Opinions by the Circuit Court of Appeals.

Grace's petition to review was filed with the Circuit Court of Appeals for the Second Circuit on October 3, 1944, under § 1006 of the Civil Aeronautics Act (R. 164-176). The petition objected to the Board's conclusion that it had no jurisdiction in the premises (R. 172-5).

On June 4, 1945, the court, Judges L. HAND, A. N. HAND and FRANK sitting, denied motions, argued by the Board, Pan American and Eastern, to dismiss the petition or affirm forthwith the Board's orders (R. 23). The grounds of the motions were that Grace did not have a "substantial interest" in the orders complained of, as required by § 1006 (a) of the Civil Aeronautics Act, and that the Board's orders herein were not subject to review.

After the completion of oral argument on the merits of Grace's petition to review, supplemental briefs were filed on December 10, 1945, at the court's request (App. II, 325-482). Thereafter Grace and Pan American each filed a reply letter (App. II, 483-9).

The opinion of the Circuit Court of Appeals, rendered January 28, 1946 (R. 351-79), summarized *supra*, p. 5, reversed the Board's order and remanded the case to the Board for further proceedings. 154 F. (2d) 271.

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Pan American and Eastern, but not the Civil Aeronautics Board, thereafter filed petitions for rehearing in the Circuit Court of Appeals on February 11, 1946 (R. 380-426), arguing *in extenso* the same contentions now raised by them in this Court. Those petitions were denied, the court filing a further opinion, dated February 21, 1946 (R. 427-32), which rejected those contentions and amplified the original opinion, emphasizing once again the public interest involved.

Only Pan American, Pan American Airways, Inc. and Eastern have filed petitions for a writ of certiorari.

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals correctly decided that the Board had the power and the duty to determine whether Panagra's failure to apply for the extension was caused by fraud or illegality of Pan American; and if so, to regard Grace as speaking for Panagra, thus making the proposed extension one to which Panagra consents.

II.

The Circuit Court of Appeals correctly ruled that the Board should decide in Docket 779 the issue as to whether Panagra's consent is blocked by fraud or illegality of Pan American.

III.

Certiorari should not issue in this case on the basis of petitioners' claims that the Circuit Court of Appeals acted upon considerations not previously advanced.

IV.

Respondent W. R. Grace & Co. was entitled to seek review of the Board's orders and no error can be predicated upon the Circuit Court's recognition of that right.

POINT I.

The Circuit Court of Appeals correctly decided that the Board had the power and the duty to determine whether Panagra's failure to apply for the extension was caused by fraud or illegality of Pan American; and if so, to regard Grace as speaking for Panagra, thus making the proposed extension one to which Panagra consents.

The decision of the Circuit Court of Appeals was in essence a recognition of the fact that the public interest in matters arising under the Civil Aeronautics Act is paramount. The case before it was much more than a private dispute between stockholders; it was a thwarting of the vital public interest. In a practical and realistic view of the facts, the court recognized that Panagra itself could not be regarded as "unwilling". The Board erred in permitting the proceedings in Docket 779 to come to an "abortive end" *by imputing to Panagra the unwillingness of Pan American.*

The court decided that this imputation was improper if the Board should find that Pan American was acting in its *own* interest to the prejudice of Panagra, or if its activities amounted to an unfair trade practice.* If such were the

* *Pennsylvania Sugar Refining Co.* v. *American Sugar Refining Co.*, 166 Fed. 254 (C. C. A. 2d, 1908), holds that the Sherman Act prohibits one corporation from utilizing its voting interest in another in such a way as to prevent the latter from engaging in a business which would compete with the former. See also *Baush Machine Tool Co.* v. *Aluminum Co.*, 72 F. (2d) 236 (C. C. A. 2d, 1934), cert. den. 293 U. S. 589. Other cases bearing on the situation where the activities of a corporation are restrained by a controlling stockholder in the latter's own interest as a competitor include *Blaustein* v. *Pan American Petroleum & Transport Corp.*, 293 N. Y. 281 (1944); and *Singer* v. *Carlisle*, 26 N. Y. S. (2d) 172 (Sup. Ct. N. Y. Co., 1940), aff'd 261 App. Div. 897 (1st Dept., 1941); app. den. 285 N. Y. 863 (1941).

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case, the court said, the Board should disregard the effect of Pan American's conduct and treat Panagra as consenting to the extension.*

The Circuit Court of Appeals correctly held that a consent by a carrier to a § 401(h) extension proceeding begun by the Board is the legal equivalent of a petition for the same extension initiated by the carrier (R. 431). This has been the position taken by the Board itself.† Eastern but obfuscates the issue by inquiring what Grace has filed which must be considered an "application" on behalf of Panagra.

The public interest, we believe, is not to be frustrated by the improper and illegal conduct of a 50% stockholder in blocking a formal application by an air carrier, which would permit the Board to pass upon the merits of the extension. Pan American, however, in effect pleads for the ability to thwart the Act in this manner with complete immunity from the Board's jurisdiction (cf. pet., p. 23).

Petitioners argue that the Circuit Court misapprehended this Court's opinion in the cases of *American Power & Light Company* v. *Securities and Exchange Commission*, and *S. E. C.* v. *Okin*, 325 U. S. 385 (1945), particularly that part of it which dealt with Okin's appeal. There, the owner

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* The Board is not, as Pan American states, "to sit in judgment as to whether Pan American is entitled to act on its belief that from the standpoint of 'the joint interest' the extension would be a mistake * * *" (Pan. Am. pet., p. 23). The Board will consider whether there was not a complete absence of any such *bona fide* belief by Pan American.

† In at least two cases which the Board had begun on its own initiative pursuant to § 401(h), the addition to the carrier's route was granted, following the express or implied consent to the proposed route by the carrier during the course of the proceeding. *Pennsylvania Central Airlines—Temporary Service to Huntsville, Ala.*, 3 C. A. B. 305 (1942); *Pennsylvania Central Airlines Tri-Cities Service*, 2 C. A. B. 524 (1941).

of 9,000 shares, out of a total of 5,000,000 shares, of common stock of Electric Bond & Share Co. sought review of an order of the Securities and Exchange Commission under the Public Utility Holding Company Act, approving the refinancing of a loan made by Electric Bond & Share to a subsidiary.

The stockholder attacked the transaction on the ground that it was both illegal and fraudulent. As the corporation took a position adverse to him, his application for relief, this Court pointed out, was "in the nature of a derivative or stockholder's action" (p. 392). A demand upon the corporation would have been futile. A majority of this Court upheld the standing of Okin to initiate the review. No circuitous route of requiring a separate prior stockholder's suit, as Pan American here suggests, was held necessary.

The holding in the *Okin* case was applied by the Circuit Court of Appeals to this controversy. Here Grace, a 50% stockholder, is asserting that Pan American, the other 50% stockholder, has used and is using the jointly owned company for its own purposes, to the detriment of Panagra; Grace also charges that Pan American has thus engaged in unfair trade practices in contravention of the Act, and the antitrust laws, and in defiance of the public interest.

In the instant case, the corporation—Panagra—unlike the carrier in *Pittsburgh & West Virginia Railway* v. *United States*, 281 U. S. 478 (1930); or in *Schenley Distillers Corporation* v. *United States**, 326 U.S.—, 66 S. Ct.

* This case is not at all in point. As the 100% subsidiary of Schenley Distillers Corporation was prosecuting a suit to set aside the order of the I. C. C., there was no need for the parent company also to secure a review of the same order, it being adequately represented by the 100% subsidiary which it controlled. It therefore had no grievance.

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247 (1946); and unlike the subsidiary company in the *Okin* case, has not had an opportunity even to take a position before the administrative tribunal.

Had Panagra been able to make application to the Board, placing before that tribunal the question as to whether the public interest required its extension, then it might well be that one of Panagra's stockholders should not be permitted to maintain an *additional* separate proceeding. But that is certainly not our situation. This crucial distinction vitiates petitioners' entire argument as to the supposed conflict of the decision of the Circuit Court of Appeals with the decision of this Court in the *Pittsburgh* case.

The inapplicability of the *Pittsburgh* case results from the fact that there *the merits of the dispute had been before the administrative body*, and had been determined according to the public interest. The Interstate Commerce Commission had found that the public convenience would be served by the application in question. In that situation there was no need to permit a minority stockholder to maintain a separate proceeding—there was no question as to any blocking of the public interest through the inability of the administrative tribunal to pass upon the substantive issues.

In our case the action by Grace was necessary and indispensable, not in order to force its view of the merits upon the Board, but in order to get the case before the Board at all for its determination.

Furthermore, in the *Pittsburgh* case the *primary* relief sought by the petitioning stockholder was a determination of the intracorporate conflict presented, because the Commission had already determined the requirements of the public interest as to the merits of the applications. In the

instant case Grace does not seek the determination of an intracorporate dispute as such, but only to the extent that the existence of that "intracorporate dispute" prevents the placing before the Board of an application by Panagra, which would permit the Board to exercise its function of determining whether the public interest requires such an extension.

Eastern admits that the *Okin* case permits a stockholder to maintain a proceeding where he can prove he has a special interest or that something alleged to be actively detrimental to the corporation is about to be done (pet., p. 34). Yet it repeats platitudes that a stockholder in the same position as any other stockholder may not speak for the corporation in attacking an administrative order (pet., p. 33).

The usual case involves the interest of one stockholder, out of many, holding a small percentage of his corporation's stock.*

But here the interest of Grace is not at all the same as the interest of "any other stockholder". The interests of the only two stockholders are diametrically opposed. Grace is in a position to suffer special financial damage by virtue of the failure to secure an extension of Panagra's route (B. R. 802, 4909). The only other stockholder, Pan American, actually benefits from its own wrong in blocking Panagra's extension, through the improvement of its own relative competitive position. Petitioners' theoretical and

* For example, from an inspection of the record in the *Pittsburgh* case, it appears that Pittsburgh owned only approximately 12% of the total stock outstanding (67,400 shares out of a total of 558,700) and owned *none* of the prior lien stock which, by reason of a default in dividends, had actual control of the corporation at and prior to the commencement of the proceeding. Pittsburgh and the other stockholders similarly situated were able to elect only three out of a total board of fifteen directors (*Pittsburgh* Record, pp. 3-4, 18).

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finespun legalisms completely ignore the peculiar facts of this case, which present a situation demanding realistic, practical relief.

Petitioner's cases are, therefore, obviously not authority for the proposition urged by them—that an administrative agency, charged with the enforcement of the public interest, is precluded from considering even those intra-corporate disputes which have the effect of obstructing any action by the Board in carrying out its duties pursuant to the declared policy of the Act. None of petitioners' cases involved a corporation *unable to act on its own behalf.* There is no reason why the *Pittsburgh* case should be extended beyond its facts, as petitioners would have it, to this wholly dissimilar situation.

The *per curiam* opinion on rehearing serves further to emphasize the fact that the Circuit Court of Appeals acted in accordance with other decisions of this Court, requiring a careful consideration of the public interest involved.*

Expressly noted in that opinion was the language of this Court in *Scripps-Howard Radio* v. *F. C. C.*, 316 U. S. 4, 14-15 (1942):

> "That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights.* * * Courts no less than administrative bodies are agencies of

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* *F. C. C.* v. *Sanders Radio Station*, 309 U. S. 470 (1940); *Scripps-Howard Radio* v. *F. C. C.*, 316 U. S. 4 (1942); *F. C. C.* v. *National Broadcasting Company*, 319 U. S. 239 (1943); *Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. —, 66 S. Ct. 148 (1945).

The public interest is defined in § 2 (c) and (d) of the Act to preclude "unfair or destructive competitive practices", and to include "Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;" (See Appendix B hereto).

government. Both are instruments for realizing public purposes" (R. 429).

The Circuit Court pointed to the "numerous provisions" of the Civil Aeronautics Act vesting the Board with plenary powers to safeguard the public interest by giving it practically complete control over the management of air carriers.*

There is no merit in the argument that the decision in the instant case implies that any stockholder may bring any intracorporate dispute before some administrative agency (Pan. Am. pet., p. 23).† Our contention is not that the Civil Aeronautics Board (or any administrative agency) must determine *every* intracorporate dispute which may arise within a corporation subject to its jurisdiction. But it *is* our contention that when fraud or illegality defeat the public interest, by preventing the Board from determining the merits of a vital question which would otherwise be before it for decision, the Board has the power and the duty to resolve such an issue. Because of its effect upon the public interest, it can then no longer be regarded as a "mere intracorporate dispute."

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* Citing specifically §§ 407, 408, 409, 411, 412, 413, 415.

† Ignoring the unusual fact situation here, petitioners predict an overwhelming of the Board with intracorporate disputes (Eastern pet., p. 36, Pan Am. pet., p. 23). A similar technique was used to oppose Grace's right to secure a review. Although this was only the third review of an order of the Board since its creation in 1938, it was claimed that the courts would be "swamped" with litigation brought by stockholders (See *e. g.*, App. II, 97).

POINT II.

The Circuit Court of Appeals correctly ruled that the Board should decide in Docket 779 the issue as to whether Panagra's consent is blocked by fraud or illegality of Pan American.

Petitioners contend that the issue as to the fraud or illegality of Pan American's actions cannot be considered in this proceeding, Docket 779 (Pan Am. pet., pp. 31-6; Eastern pet., pp. 39-43).

The lamentation over a supposed invasion of the administrative process, and "intrusion" on the discretion of the Board, might provoke more sympathy were it the Board (apparently acquiescing in the decision) which made outcry—rather than the party whose fraud and illegality has successfully blocked the proper functioning of that very Board during all these years.

No litigant ever strove more mightily to disguise a crucial matter of substance as one of mere procedure than does Pan American here. But the court's decision is not on a point of procedure. There is a vast difference between a question as to the order in which respective applications shall be heard, and a question whether one party shall be permitted to exert its power to prevent an application from ever being filed before the administrative Board at all.

For this reason the case of *F. C. C.* v. *Pottsville Broadcasting Company*, 309 U. S. 134 (1940), which petitioners urge, is entirely inapplicable to the situation in Docket 779, where the Board did not exercise jurisdiction, and thus

never considered at all the question of public convenience and necessity therein presented.

The court's remand is clearly within the power expressly conferred upon it by § 1006(d) of the Civil Aeronautics Act, to order further proceedings by the Board. To the Board, the court left the function of determining the facts as to Pan American's actions—which the court expressly refused to prejudge *—as well as the discretion as to the need for further hearings and other procedural matters. Consequently there is no intrusion upon the administrative process. This decision increases, not diminishes, the Board's powers and jurisdiction.

Pan American states that the Board's procedure prejudiced no right of Grace (pet. pp. 35-6). The combination of the Board's decision in Docket 779, and its failure ever to act upon the petition Grace filed in April, 1942 in Docket 744, apparently ended the entire controversy so far as the Board was concerned. The final statement in the Board's opinion, made after mentioning the deadlock between Pan American and Grace in Panagra, to the effect that

> "*We have sought remedy under the Civil Aeronautics Act*, but after having the facts presented in extensive public hearings we must conclude that the Act does not give the Board the power to take the action contemplated by this proceeding" (R. 47)

apparently reflected a view that it had exhausted the extent of its powers under the Act to deal with the situation.

There is no justification for the impression petitioners seek to foster that there was something additional which Grace could have done to bring on action in Docket 744 upon

* R. 372, 431.

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its charges against Pan American (Pan Am. pet., p. 32; Eastern pet., p. 35).*

The Board made no actual determination that those issues of Pan American's fraud or illegality should be considered in a separate proceeding, as Pan American's brief (pp. 31-3) implies. As the court below pointed out, "* * * it does not appear that, if the Board had believed the power to exist, it would have refused to press the proceeding to a conclusion; * * *" (R. 372).

Inasmuch as the Board has the power to decide the issue, and in view of the peculiar circumstances of this case, the Circuit Court of Appeals correctly held that "to frustrate the whole undertaking when it lay ripe for final conclusion was, we think, beyond even that generous latitude which must be accorded to the Board's discretion."

Pan American's contention that the question of its fraud or illegality can be considered only in some other proceed-

* Grace brought the subject of Pan American's action blocking Panagra directly before the Board as early as December of 1941, when it filed Docket 707. It reiterated its protests even more strenuously in filing its petition in 744 in April, 1942. From the moment that the Board instituted this proceeding, Docket 779, Grace has espoused the cause of Panagra's extension therein and battled against Pan American's blocking of this extension at every stage of this proceeding, and with all possible vigor. Through six weeks of trial of the case Grace put in all the evidence in favor of the extension, and also showing the fraudulent and illegal actions of Pan American. It was Grace which opposed Pan American's motion to dismiss the proceeding for lack of jurisdiction, and thereafter sought reargument; Grace took the case to the Circuit Court of Appeals to secure a reversal of the Board's dismissal; it was Grace which intervened in the Latin American case (Docket 525), again to press the cause of Panagra's extension. It is Grace which now in this Court is still the party espousing the extension, still pointing to Pan American's fraud and illegality, while Pan American continues to resist the extension by every means at its disposal.

The unremitting fight that Grace has fought step by step, and day by day, for over five years demolishes any implication that Grace has permitted its objection to Pan American's action to lapse.

ing is but another outgrowth of its perennial defense that this controversy is more properly to be considered in some other forum, or in some other proceeding, or on some other theory.*

No separate proceeding is needed because the complete evidence on all phases of this controversy concerning the unlawfulness of Pan American's conduct was put into *this* record in the course of the extensive hearings.

The record in this 779 proceeding is the best proof. Although peppered with assertions that the issues in Docket 744 were not being tried, the transcript of the hearing shows that mere lip service was paid to that principle.† The actuality is that objections to evidence concerned with 744 were always overruled (*e. g.* B. R. 1362-8).

Everything went in.‡

Indeed, as the hearing developed further, even the Examiners, *non constat* their former statements, recognized

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* It never tires of contending to Grace that there are "other and more suitable paths for asserting its claims" (Pan Am. pet., p. 40), all the while blocking every path which Grace takes.

† When the order instituting 779 came down, Grace believed its petitions in 707 and 744 had achieved their principal purpose. In that belief, and correctly anticipating that Pan American would seek to obscure the public interest requiring Panagra's extension, Grace was insistent that in 779 the only question remaining was the public convenience and necessity for the extension. Pan American, on the other hand, insisted that many other considerations were involved, including those raised in the pleadings in Docket 744 (B. R. 54, 131-2, 1753; App. II, 234). Pan American's view prevailed.

‡ The single instance in the entire six weeks' trial of exclusion of something relevant to 744 was the Examiner's refusal of Pan American's request to mark in evidence Grace's petition in Docket 744. The exclusion was based on the sole and express ground that the complaint in 744 was a formal public document already on file with the Board, to which Pan American's counsel was free to refer in his brief and argument (B. R. 1368).

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its broader scope. Then they overruled objections to new lines of inquiry with such statements as:

> "Examiner Brown: Mr. Cahill, we have got to make it clear that we have got a very wide investigation. In the exhibits that have been submitted not only by Pan American but also by Grace and by Panagra, we have gone into details concerning the organization and development of this company back from the days of its early inception. We have gone into matters of the minutest detail, concerning the operations and the conflict of interests which have arisen, and we have gotten into questions concerning control under Section 408 of the Act, and while I agree that this investigation was for the purpose of determining whether or not Panagra should be extended from the Canal Zone to the United States, *those issues are in here and we might just as well face it, and that is what we are going to have to hear*" (B. R. 1890).

As the Board's counsel remarked:

> "• • • we are getting so far away from our convenience and necessity • • • that we don't even recognize [a question of convenience and necessity] when we see it" (B. R. 1417).

These additional subjects having thus been opened up, Grace naturally had to put in its evidence relating to points beyond the scope of a mere convenience and necessity case.

Consequently, by the end of the hearing, the greater portion of the record, which covered the entire history of Panagra, involved evidence relevant more to the complaint in Docket 744 than to the limited issue of public convenience and necessity. *This hearing covered every point raised in*

*Grace's petition in Docket 744, as well as Pan American's countercharges therein.**

Eloquent proof attesting that fact is submitted in a tabulation of some of the subjects tried in the hearings in this case, set forth in Appendix A to this brief. Furthermore, Pan American fails to suggest an iota of additional evidence which it has not already produced in this case bearing on the question of its own acts and motives.

Small wonder then that the court below characterized as "futile and dilatory" a course which would require one or more separate proceedings to determine the questions of the illegality of Pan American's actions and the extension of Panagra. This, the court pointed out, was to be avoided unless compelled by a defect of power not existent here.†

Likewise, the reasons expressed by the Circuit Court of Appeals, and ordinary common sense—having regard to practicalities rather than to formalism—amply support the court's rejection of Pan American's suggestion that Grace

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* At an earlier stage of the case, Pan American admitted the broad scope of this record:

> "The various charges *and countercharges* which occupy so many pages of the voluminous record are still more clearly irrelevant to the issue here presented for determination" (B. R. 8681).

This same statement, made in Pan American's brief before the Board on its motion to dismiss, when compared with Grace's argument to the Board concerning the alleged unwillingness of Panagra (*infra*, pp. 32-34), also answers the weak innuendo that Grace induced the Board's error of not considering the grounds stated in the court's opinion (Pan Am. pet., p. 40).

† Pan American's insistence that the Board must ignore in this proceeding the same underlying issue as to why Panagra has not applied, would compel the Board to put on "complete blinders", which this Court has held to be obviously not consistent with good sense. *United States* v. *Pierce Auto Freight Lines*, 326 U. S. —, 66 S. Ct. 687, 695 (1946).

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must travail through the labyrinth of a stockholder's suit in equity before it can—years later—present to the Board the application of Panagra.* When alternative procedures are possible the choice of forum should not be left to the wrongdoer.

The wisdom of the court in pointing out the likelihood of prejudicial effect upon Panagra of further delay is shown by subsequent events.† On May 22, 1946 the Board announced its decision in the Latin American case (Docket 525 *et al.*). A route was awarded to Braniff Airways from Houston, in the United States, via Havana, *down the West Coast of South America to La Paz and thence to Buenos Aires.* Furthermore, Braniff will have connections at Havana with National Airlines and with Chicago & Southern Air Lines, so it will offer a two carrier service from a large section of the United States to Buenos Aires via the West Coast of South America. Meanwhile, via the Panagra route this would still entail a three carrier operation: Panagra south of the Canal, Pan American between Florida and the Canal, and Eastern (or National) from Florida north (see map, *supra*).

Likewise, in the Latin American case the Board granted a route between San Juan and New York to Pan American, which enables it to offer a shorter, more direct and faster one carrier through service from New York (the principal traffic center) to Buenos Aires via its East Coast

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* Cf. *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385 (1945).

† The court stated "It is not impossible that should the Board much longer delay, and then decide that the extension should be granted to Panagra, its action might be frustrated by the intervening grants of licenses to other carriers" (R. 372).

Petitioners complain that the court's footnote referred to "material not in the record." The matters referred to in Docket 525 *et al.* were matters of public record in one of the proceedings before the Civil Aeronautics Board, of which a court would normally take judicial notice.

route. Panagra, still dead-ended at the Canal without a United States terminal, must face the increased competition of these aggressive American airlines which have the advantages of United States terminals.

Under the Bilateral Air Transport Agreement between the United States and Great Britain signed at Bermuda on February 11, 1946, the British are awarded a route from London to New York and thence, via Cuba, Jamaica and Panama, down the West Coast of South America, paralleling Panagra.

Furthermore, applications for United States terminals by foreign air carriers in South America are now being considered by the Board.* The Board has recently been granting United States terminals to foreign air carriers with but little formality.†

These dynamic developments foreshadow disaster for Panagra, if the extension to the United States be not granted now. Unless this controversy be promptly determined in this proceeding, the ultimate legal victory of

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* *E. g.*, Docket 1983, Application of *Aerovias Nacionales De Colombia, S. A.*, for service from Bogota and Baranquilla, Colombia to Miami and New York; Docket 1824, Application of *Lineas Aereas Taca De Colombia, S. A.*, for service Bogota-Canal Zone-Miami-New York; Docket 774, Application of *Taca, S. A.*, for service from San Salvador to New Orleans and Miami; Docket 2180, Application of *Linea Aerea Taca de Venequela, C. A.*, for service from Venezuela to New York; Docket 2281, Application of *Linea Aeropostal Venezolana* for service from Maiquetia, Venezuela to Miami via Havana, and to Montreal via Havana and New York.

† *E. g.*, CAB Order 4482, dated Jan. 26, 1946, granting *Swedish Intercontinental Air Lines'* application in Docket 2071, for permit to operate between Stockholm and New York and Chicago; Order 4630, dated March 1, 1946, granting *Det Danske Luftfartsetskat A/S* (Danish Air Lines) a permit authorizing transportation between Copenhagen, Denmark and alternate terminal points, New York and Chicago; Order 4634, dated March 14, 1946, granting *Royal Dutch Airlines* (KLM) a permit authorizing transportation between Amsterdam, The Netherlands, and the terminal point New York, N. Y., and between the Netherlands West Indies and Miami, Florida.

Panagra will be a Pyrrhic one—with Panagra foreclosed, as a practical matter, from a route to or terminal in the United States—a possibility of which Pan American is not unaware.

Finally, Pan American asserts (pet. pp. 34-5) that if this controversy is determined in 779, and a certificate, approved by the President, is awarded to Panagra, there is doubt as to whether Pan American could then secure a judicial review of the Board's findings of fraud or illegality. But *Pan American Airways* v. *Civil Aeronautics Board*, 121 F. (2d) 810 (C. C. A. 2d, 1941), held to be beyond judicial review only those matters relating to the issuance of a certificate which fell within the scope of the discretion and final determination of the Executive, and not purely legal questions.

If a determination of Pan American's fraud or illegality is a reviewable legal question, it does not cease to be such because decided in this proceeding rather than a separate one under § 411. It is the nature of the issue, not the proceeding in which it is raised, that determines its reviewability.

POINT III.

Certiorari should not issue in this case on the basis of petitioners' claims that the Circuit Court of Appeals acted upon considerations not previously advanced.

Petitioners' contention that the court decided the case on an objection never presented to the Board, or even to the court, is not only factually incorrect, but completely misconceives the decision below. The court decided the legal question that the Board *did* have jurisdiction and power to extend Panagra's route, if Panagra's alleged un-

willingness was found to be attributable to Pan American's fraud or illegality. It left the factual issues to be decided by the Board. The issue of the Board's jurisdiction and power had been the sole issue argued before the Board. Grace's petition to review, as the court pointed out, objected to the Board's failure to take jurisdiction.

Completely without foundation is the insistence that the grounds upon which the decision is based had not previously been advanced. The very heart of this controversy since 1941 has been Grace's insistence that Panagra is unwilling only in the purely artificial sense that Pan American's conduct has prevented the carrier from itself filing an application for the extension.

Grace has pressed this point before both the Board and the court. Thus, in Grace's brief before the Board, in opposition to Pan American's motion to dismiss for lack of jurisdiction, it was stated:

> "No application for such an amendment of its certificate has been filed by Panagra for the reason that the moving party, Pan American Airways Corporation, which owns 50% of Panagra's stock, has blocked such an application.
>
> • • • • • • • • •
>
> "The opposition to the extension comes not from Panagra, but from Pan American which has consistently utilized its position as a 50% stockholder to restrain Panagra's development. The individuals who comprise the Panagra management have unanimously testified in favor of the extension, although they have been permitted to do so only in their individual capacities • • •.
>
> "Hence the position which Panagra takes with respect of the proposed amendment of its certificate is not one of hostility, but, at most, of neutrality.

At the insistence of Pan American, Panagra takes no position one way or the other on the contemplated extension (635). *Thus an underlying assumption which forms the basis of the Pan American motion to dismiss, namely, the unwillingness of the carrier, is unfounded.*

"Even though there be no application by Panagra and even if Panagra were technically 'unwilling', the Board may validly compel it to operate to a terminal in Florida" (B. R. 8587-8).

And in oral argument before the Board, counsel for Grace made the following statement:

"Now, treating of the alleged unwillingness of Panagra from the factual side, that is one of the fundamental grounds of the Pan American motion to dismiss. *Panagra is not unwilling in the sense that it is resisting this proposed amendment.* W. R. Grace & Co. owns 50 percent of the stock of Panagra, and directors representing W. R. Grace & Co.'s stock interest have urged for years, that Panagra be permitted to apply for a United States terminal.

"Now, it is true the members of the Panagra management were not allowed upon this trial to testify in their official capacity, but they were permitted to testify in their individual capacity, and they testified, to a man, in favor of the proposed extension.

"Now, Panagra, let the fact be clear, has made no application for a United States terminal, solely because its other 50 percent stockholder, Pan American Airways, has consistently refused to permit such application. Pan American, the record here discloses, even went to the extent of instructing its representatives on the Panagra Board not to attend Panagra directors' meetings. Pan American itself called a Panagra stockholders meeting to consider an application for a United States terminal, and it stayed away from that, too.

> "Now, the reason, among others, for Pan American's refusal to permit the second largest American Flag carrier abroad to come to the United States is that the extension would not be in the best interests of Pan American. *Pan American is here trying to take advantage of a situation created by its own hostility to Panagra's interests*" (B. R. 8474-5).

In various briefs before the Circuit Court, Grace pointed out in some detail the reasons why Panagra had not itself applied for a terminal in the United States (brief on motion to dismiss, App. II, 107-18, 120-23, 125-27; main brief, App. II, 142-4).

Again in Grace's reply brief in the Court of Appeals:

> "It is inequitable that W. R. Grace & Co. should be bound by Panagra's inaction, when this inaction results from a wrong on the part of a stockholder whose interests are in conflict with those of Panagra" (App. II, 316-17).

And further on the point:

> "Pan American's attempts to stifle Panagra—the so-called 'intracorporate dispute' referred to—are not only a violation by Pan American of its fiduciary duty to Panagra and to W. R. Grace & Co., but also a restraint of trade within the meaning of the antitrust acts and an unfair method of competition within the meaning of § 411 of the Civil Aeronautics Act" (Reply Brief, App. II, 313-15).

Finally, in Grace's supplemental brief in the Circuit Court of Appeals:

> "*Panagra never was unwilling.* All of its executives, directly engaged in the conduct of its opera-

tions, including its President, two Vice-Presidents and Traffic Representative, testified strongly in favor of the extension (R. 386-7, 521-2, 802, 1154-6), as did the Panagra directors nominated by Grace. The only contrary voice came from the Panagra directors representing Pan American, and inasmuch as their action is in bad faith and for ulterior purposes, legally they should not be regarded as speaking on behalf of the corporation" (App. II, 349; see also 334-350).

The issue raised by Grace's charges concerning the unfair and illegal restraints of Pan American upon Panagra has been prominent every step in these proceedings, including, in addition to those already mentioned:

Board's Order instituting Docket 779 (R. 51).

Answer of Pan American in Docket 779 (B. R. 66).

Reply of W. R. Grace & Co. to Answer of Pan American (B. R. 277-8).

Hearings before the Examiners in Docket 779. See Appendix A hereto.

Opinion of the Board (R. 35-7).

Petition of W. R. Grace & Co. for review of the Board's orders (R. 171).

Oral argument before the Circuit Court of Appeals.

But even if we assume *arguendo*, contrary to these facts, that the instant case was decided on an objection not previously advanced, the contentions of petitioners are still without merit.

When the decision of the Board was taken by Grace to the court below, the entire record was before the court.

Its power on review is stated in § 1006(d) of the Civil Aeronautics Act, which petitioners completely overlooked:

"Power of Court

"(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, *to order further proceedings by the Authority.* • • •"

Petitioners' argument is that the power of the court is circumscribed in this case by the provisions of § 1006(e):

"Findings of Fact by Authority Conclusive

"(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

The obvious reason for such a provision in the statute is to give the administrative body an opportunity to consider in the first instance, and to make findings of fact with respect to, questions which may be urged upon review of its orders. *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253 (1943).

The legislative policy in this respect is lucidly expressed in this Court's opinion in the case of *N. L. R. B.* v. *Cheney Calif. Lumber Co.,* 326 U. S. —, 66 S. Ct. 553, 555 (1946), as follows:

"Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was

therefore not within the power of the court below to make the deletion it made."

The "deletion" referred to in the latter part of the above quotation was the striking out of a cease and desist order issued against the company by the District Court, to which no objection was made by the company until the Board sought judicial enforcement of its order. This Court held that the objection to the cease and desist order, inasmuch as it involved questions of fact concerning the history of the company's relationships with its employees, should have been presented to the Board; and that having been presented in the first instance to the District Court, the excision of the order by the District Court was reversible error.

The array of cases presented by Pan American and Eastern in support of this argument presents similar situations. Their underlying principle is that *questions of fact, or questions involving facts,* were presented to the reviewing court, which for manifest reasons should have been committed to the administrative agency in the first instance.

That this is the rationale behind the rule invoked by petitioners is further apparent from the heading of subsection 1006(e)—"Findings of Fact by Authority Conclusive" —which shows that the purpose of the rule is to assure that the administrative tribunal shall make the findings of fact.*

This rule has in no sense been violated by the decision of the Circuit Court of Appeals, for all the court has done is to remand the proceeding because of legal error by the Board as to the extent of its power. The court decided no issue of fact. Expressly disclaiming this, it remanded the

* This heading is nowhere even mentioned by petitioners in their frequent quotation of and reference to this subsection.

case, as authorized by § 1006(d), to the Board to determine the factual issues involved.

This situation is totally unlike the cases cited by petitioners, where objection is raised by a party to the consideration of a matter not previously argued, on the ground of surprise or deprivation of legal rights. There is absolutely no prejudice to petitioners. The facts are not being removed from the Board's consideration but are being placed before it.

In their anxiety to avoid the inevitable consequences of a decision on the merits on the present record, petitioners have overlooked an important doctrine, well established by decisions of this Court. Those cases hold that even where (unlike here) a decision was grounded on an objection not urged below, an overly-nice application of rules of procedure should not be insisted upon where the result would be to defeat the principles of fundamental justice. Courts have inherent power to see that justice is done.

Thus, in the case of *Hormel* v. *Helvering*, 312 U. S. 552 (1941), Mr. Justice BLACK, speaking for the Court, pointed out that:

> "Orderly rules of procedure do not require sacrifice of the rules of fundamental justice" (p. 557).

Commenting on the general rule that appellate courts will not ordinarily consider matters not raised below, he said:

> "For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine *questions of fact.* This is essential in order that parties may have the opportunity to offer all the evidence they believe rele-

vant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence * * * Recognition of this general principle has caused this Court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the Board of Tax Appeals. *But those cases do not announce an inflexible practice,* * * *" (pp. 556-7).

The opinion of this Court further stated:

"There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See *Blair* v. *Oesterlein Machine Co.*, 275 U. S. 220, 225.

"Rules or practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy (p. 557).

* * * * * * * * *

"Analogous in principle is the philosophy which underlies this Court's decisions with relation to appellate practices in other cases: those in which it has been held that a decision of the Board of Tax Appeals can be supported in the reviewing court on a new theory of law; *those which have been remanded because the lower courts failed to give consideration to*

> *a phase of the case involving legal theories not presented;* * * * " (p. 558).*

An earlier decision by this Court recognized the same principle, *United States* v. *Rio Grande Irrigation Co.*, 184 U. S. 416, 423 (1902):

> "As upon this appeal in equity the whole case is before us, we can render such decree as under all the circumstances may be proper. *Ridings* v. *Johnson*, 128 U. S. 212, 218. If it appears that injustice may be done by proceeding to a final decree upon the record as it is presented to us, we have the power to forbear a determination of the merits and remand the cause for further preparation."

And most recently, in *U. S.* v. *Pierce Auto Freight Lines, Inc.*, 326 U. S. —, 66 S. Ct. 687 (March 11, 1946),

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* The rule of the *Hormel* case, *supra*, was followed in *Commissioner of Internal Revenue* v. *Wells*, 132 F. (2d) 405 (C. C. A. 6th, 1942), which arose on a motion by the Commissioner of Internal Revenue for reconsideration of a tax liability in veiw of a decision of the Supreme Court handed down after the opinion of the Board of Tax Appeals. The following quotation from the opinion of the court is appropriate:

> "Rules of practice and procedure are devised to promote the ends of justice, and in the less formal proceedings before administrative agencies, such rules do not require sacrifice of this principle, by refusal of an appellate court to give consideration to issues not raised below. * * * Where, on review of a decision of the Board, an issue raised is purely one of law requiring no new or amplified factual determination, * * * the fact that the issue was not raised in the petition to the Board is immaterial; *Black Motor Co.* v. *Commissioner of Internal Revenue*, 6 Cir., 125 F. (2d) 977; and where a decision of the Board has been handed down prior to a decision of the Supreme Court and the Government, on appeal, in the light of such decision, relies upon a statutory provision not previously presented, the case is remanded to enable the respondent to introduce additional evidence directed to the new issue. *Helvering* v. *Richter*, 312 U. S. 561, 61 S. Ct. 723, 85 L. Ed. 1043."

this Court sustained the view of the District Court that where the public interest was involved, it might consider issues not raised before the Interstate Commerce Commission. Mr. Justice RUTLEDGE stated:

> "In a strict view neither the appellees nor the court were entitled to raise these questions. For it was not at any time suggested to the Commission, as it might have been upon petition for rehearing, that the proceedings had been conducted on the theory that both applications would not be granted. It is highly questionable therefore whether the appellees have not waived this question. *But the District Court, in raising it, has said that it was acting in protection of the public interest and we pass therefore to consideration of the issue on its merits*" (p. 693).

See also *U. S.* v. *Shelby Iron Co.*, 273 U. S. 571, 579 (1927) and *Gulbenkian* v. *Gulbenkian*, 147 F. (2d) 173 (C. C. A. 2d, 1945).

In two recent cases this Court has declined to grant certiorari, although the opinion in the Circuit Court of Appeals rested on grounds not raised in the court below. *Wall* v. *Brim*, 138 F. (2d) 478 (C. C. A. 5th, 1943), cert. den. 324 U. S. 857 (1945); *U. S.* v. *Cushman*, 136 F. (2d) 815 (C. C. A. 9th, 1943); cert. den. 320 U. S. 786 (1943).

As to the intimations of petitioners that they had no opportunity to argue these points in the Circuit Court of Appeals: not only were these phases of the case covered on oral argument and in extensive supplemental briefs (App. II, 417-482, 487-9), but both petitioners argued all the points they now make in their petitions for reargument (R. 380-426). These petitions received full consideration, as the court's second opinion shows.

Clearly there was no error in the court's resting its decision upon the grounds stated, and the petitioners' request for certiorari on that basis is unjustified.

POINT IV.

Respondent W. R. Grace & Co. was entitled to seek review of the Board's orders, and no error can be predicated upon the Circuit Court's recognition of that right.

The question, again raised by Pan American, as to Grace's right to procure a review of the Board's orders was twice presented to the judges of the Circuit Court of Appeals—first by motion to dismiss the review for lack of jurisdiction, and again when the court considered the petition for review on the merits, and on each occasion was argued at great length.*

Further characterizations of Grace as a "mere stockholder", and arguments that the orders of the Board merely failed to compel action which Grace sought, add nothing to the prior unsuccessful attempts to demonstrate that Grace had no right to a review. Indeed, Pan American's claim that the Board "simply declined to exercise coercion against it [Panagra]" and that "the order had no effect whatever upon the corporation" (p. 46) merely rephrases its metaphysical argument that notwithstanding the Board's dismissal, Panagra's *rights* remained—although it cannot *exercise* those rights. This contention reduces itself to the absurdity that the Board's interpretations as to

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* The contention is so unsubstantial that we will not trouble the Court with lengthy arguments. The arguments of Grace on this point are set forth in its brief in opposition to the motion to dismiss, and also in its reply brief on the petition to review (App. II, 120-31; 316-18).

its own jurisdiction and its final dismissal of the proceeding, ending, as a practical matter, all possibility of the extension, are appealable by no one. This would be a shocking anachronism in the light of adjudications by this Court under similar statutes enforcing the right of persons to secure review when necessary to vindicate the public interest.

Applicable here is this Court's decision in the companion cases, *American Power & Light* v. *Securities and Exchange Commission* and *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385, 65 S. Ct. 1254 (1945). It reaffirms the principle followed by the Circuit Court of Appeals in this case, that under proper circumstances a stockholder may challenge an administrative order involving his corporation. The circumstances there involved were described as those where his "economic interest is affected by an order affecting his company under circumstances which make it inequitable that he be bound by the action or inaction of the management" (p. 1256).

That Grace's economic interest is affected by the orders of the Board can be demonstrated beyond peradventure of doubt.* This is a case, if there ever was one, where the circumstances make it inequitable that Grace be bound by the inaction of the Panagra Board, when such inaction results from a wrong on the part of a stockholder whose interests are in conflict with those of Panagra. That stockholder is the same party which now opposes any judicial review of the Board's order.

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* See brief of Grace on motion to dismiss the review (App. II, 120 *et seq*).

Conclusion.

We respectfully submit that the petitions do not present any question which merits review, and that the decision of the Circuit Court of Appeals is well supported by established legal and equitable principles and by the paramount public interest. Those considerations also indicate that these petitions for writ of certiorari to review the interlocutory decision below should be denied.

Dated: June 7, 1946.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for Respondent,
W. R. Grace & Co.

FRED J. KNAUER,
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APPENDIX A.

Partial List of Subjects Litigated in Hearings in Docket 779.

1. The position and actions of Grace for, and Pan American against, the extension of Panagra, up to the time of the hearing (R. 121-141; B. R. 1196-7, 1279-80, 1444-5, 2461-79, 3326-37).*

2. The failure of Pan American directors of Panagra to cooperate with the eventually successful efforts of the Grace directors to extend Panagra's route to La Paz, Bolivia (B. R. 1111-2, 1505-8, 2079-81, 2586-8, 3653-4).

3. The attempt by Pan American to extract from Panagra a huge payment to Pan American before consenting to an extension of the Panagra route from La Paz, Bolivia, to Cordoba, Argentina (B. R. 1509-10, 1520, 2081-3, 2174-5, 2510-11, 2584-6, 2597, 2602, 3543-44, 3599-3601, 3780-2).

4. The opposition of the Pan American directors of Panagra to the alteration of the Panagra route so as to serve the important city of Cali, in Colombia (incidentally making possible the substitution of modern land planes for outmoded flying boats with which Pan American wanted to saddle Panagra). This was because Pan American's substantial interest in Scadta, the then German managed airline in Colombia, would be adversely affected. The final acquiescence of the Pan American directors a year later only on condition that Panagra would not serve the cities of Medellin and Turbo, also served by Scadta (B. R. 1511-19, 1116-22, 1679-81, 1687-88, 2361-64, 2406-2417, 3002-3, 3546-9, 3571).

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* The record references to these subjects are only illustrative, not exhaustive. They refer only to the testimony, and do not include the hundreds of exhibits received on these subjects.

5. The attempt by Pan American to force Panagra and Grace to sign an agreement not to operate in the Caribbean (B. R. 2607-8, 1518, 3643).

6. The attempt by Pan American in the early years to induce the Post Office Department to cut down the number of United States mail trips by Panagra to Buenos Aires, in order that Pan American might itself be financed to fly to Buenos Aires via the east coast of South America (B. R. 3471-4, 1503-4).

7. The discussions between the Grace and Pan American directors of Panagra in the early years as to the choice of flight equipment for Panagra (B. R. 1107-8, 1123-33, 1220-40).

8. The successful fight of the Grace directors in the early years to prevent Pan American from controlling the radio operations of Panagra (B. R. 1190, 1204-9, 1388-90, 1538-9, 1665-6, 1821, 1840-1, 2370-86).

9. Pan American's counter-charges that W. R. Grace & Co.'s interest in Grace Line, and representation of Panagra in South America by the agencies of W. R. Grace & Co., were detrimental to Panagra (B. R. 992-1001, 1300-1, 2558-9, 3553, 3726-7).*

10. Charges by Pan American concerning the operations of Panagra over a long period of years with respect to the handling of traffic, and other matters (B. R. 1201-2, 1688-1702, 3097-8).

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* After most elaborate efforts to uncover something in a retaliatory attempt to show that Grace has supported interests in conflict with Panagra (searching through thousands of letters and documents in Panagra's files, bringing in an ex-employee of Grace, and resorting to all form of inquisitorial research), only the most trivial and inconsequential evidence on this point could be produced by Pan American's counsel.

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11. The unfair competitive advantage achieved by Pan American through rendering inadequate connecting service between Miami and the Canal Zone, upon which connection Panagra is dependent in its competition for United States-Buenos Aires traffic with Pan American's East Coast of South America service (B. R. 626, 1288-96, 1371-3, 1702-3, 1760-1, 2103, 3604-7).

12. The struggle as to whether Panagra should be managed as an independent entity (as it was), as urged by the Grace directors of Panagra, or as a subordinate part of the Pan American Airways "System", as urged by the Pan American directors (B. R. 1104, 1498-1501, 1684, 2524-9, 3649-50).

13. The related controversy over Pan American's continuous efforts to submerge distinctive publicity and advertising for Panagra, and to substitute Pan American Airways "System" publicity and advertising (B. R. 897-899, 1549-61, 1580-87, 1704, 2481, 2637).

APPENDIX B.

Additional Statutory Provisions

(Civil Aeronautics Act)

"DECLARATION OF POLICY

"Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority * shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

* * * * * * *

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;"

"COMPLAINTS TO AND INVESTIGATIONS BY THE AUTHORITY

"Filing of Complaints Authorized

"Sec. 1002. (a) Any person may file with the Authority a complaint in writing with respect to anything done or

* The name "Authority" was later changed to "Board".

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omitted to be done by any person in contravention of any provision of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Authority to investigate the matters complained of. Whenever the Authority is of the opinion that any complaint does not state facts which warrant an investigation or action on its part, it may dismiss such complaint without hearing.

"Investigations on Initiative of Authority

"(b) The Authority is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is authorized to be made to or before the Authority by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority shall have the same power to proceed with any investigation instituted on its own motion as though it had been appealed to by complaint.

"Entry of Orders for Compliance With Act

"(c) If the Authority finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Authority shall issue an appropriate order to compel such person to comply therewith."

"Power of Court

"Sec. 1006. (d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the Authority."

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 4

PAN AMERICAN AIRWAYS CORPORATION and PAN AMERICAN AIRWAYS, INC.,
Petitioners,

against

W. R. GRACE & CO.,
CIVIL AERONAUTICS BOARD, ET AL.,
Respondents.

No. 5

EASTERN AIR LINES, INC.,
Petitioner,

against

W. R. GRACE & CO.,
CIVIL AERONAUTICS BOARD, ET AL.,
Respondents.

MOTION TO DISMISS WRITS OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

PAN AMERICAN AIRWAYS CORPORATION and PAN AMERICAN AIRWAYS, INC., *Petitioners,* *against* W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*	No. 4
EASTERN AIR LINES, INC., *Petitioner,* *against* W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*	No. 5

MOTION TO DISMISS WRITS OF CERTIORARI

Now come Pan American Airways Corporation and Pan American Airways, Inc., petitioners in No. 4 and respondents in No. 5, and W. R. Grace & Co. and Pan American-Grace Airways, Inc., respondents in Nos. 4 and 5, and move that the writs of certiorari granted by this Court on June 10, 1946, be dismissed, and for grounds of such motion set forth as follows:

1. On June 10, 1946, this Court issued writs of certiorari, one on the petition of Pan American Airways Corporation and Pan American Airways, Inc., and the other on the petition of Eastern Air Lines, Inc., to review an

order of the Court of Appeals for the Second Circuit, filed February 25, 1946, in a cause pending in said Circuit Court of Appeals entitled "W. R. Grace & Co., Petitioner, against Civil Aeronautics Board, Pan American Airways Corporation, Pan American Airways, Inc., et al, Respondents." The cause so pending in the said Court of Appeals was initiated by a petition filed by W. R. Grace & Co. to review an order of the Civil Aeronautics Board dated May 24, 1944, (R. pages 4-5) and certain related orders of the Civil Aeronautics Board.

2. The said order of the Civil Aeronautics Board dated May 24, 1944, had dismissed for want of jurisdiction on the part of the Board a certain proceeding pending before the Board bearing the Board's Docket No. 779 entitled "In the Matter of the Panagra Terminal Investigation".

3. The nature of the said proceeding Docket No. 779 before the Civil Aeronautics Board was as follows:

Pan American-Grace Airways, Inc. (hereinafter called "Panagra") is a Delaware corporation. Half of the capital stock of Panagra has at all times been owned by Pan American Airways Corporation and half by W. R. Grace & Co. Pan American Airways Corporation and W. R. Grace & Co. has each had at all times equal representation upon Panagra's Board of Directors. Panagra is an air carrier as defined in the Civil Aeronautics Act of 1938 and holds a certificate of public convenience and necessity authorizing operations between the Canal Zone and Buenos Aires, Argentina via the west coast of South America (R., p. 6). Pan American Airways Corporation owns all of the stock of Pan American Airways, Inc., an air carrier holding a

certificate of public convenience and necessity for operations between various points in the continental United States and the Canal Zone, as well as between points in the continental United States and other points in Latin America and elsewhere.

For some time prior to the initiation of Docket 779 W. R. Grace & Co. had advocated, and Pan American Airways Corporation had opposed, the filing by Panagra of an application for a northward extension of Panagra's certificate from the Canal Zone to a point or points in the continental United States. Because of the equal division in Panagra's Board of Directors, no such application was filed. On December 16, 1941, W. R. Grace & Co. filed a petition and complaint, Docket No. 707, with the Civil Aeronautics Board, requesting the Board to institute a proceeding pursuant to Section 401(h) of the Civil Aeronautics Act to alter, amend and modify Panagra's certificate of public convenience and necessity so as to make the northern terminal of Panagra's route a point in the continental United States (R., p. 8).

By order dated September 10, 1942, as amended by subsequent order dated October 22, 1942, the Board, of its own motion, instituted a proceeding, Docket No. 779, to determine whether the public convenience and necessity required that Panagra's certificate be altered, amended and modified to authorize and require that Panagra's route terminate at one or more designated points in the continental United States (R., pp. 9-10). Pan American Airways Corporation moved to dismiss said proceeding on the ground that Section 401(h) of the Civil Aeronautics Act did not authorize the Board to extend the route of an air carrier in the absence of application for such an extension by the

carrier and, in the alternative, that, even though such power might exist in certain cases, the Board could not compel the carrier to extend its lines into a territory wholly different from that previously served (R., p. 10). After hearings had been held, the Board granted this motion and dismissed the proceeding on the ground that, although Section 401(h) of the Act gave the Board certain powers to require extensions by air carriers, this did not include an extension, such as that believed to be involved in the pending case, which "would constitute a basic transformation of the character of the carrier" (R., p. 17).

4. The Court of Appeals for the Second Circuit, on petition for review filed by W. R. Grace & Co., directed that the proceeding be remanded to the Civil Aeronautics Board for further proceedings in conformity with the Court's opinion dated January 28, 1946 (R., p. 433). The Court stated that it would "assume for argument that the Board was right in its holdings, if Panagra was to be regarded as an unwilling carrier, and if therefore the only issue was whether the proposed extension could be forced upon it" (R., p. 369). However, the Court held, on the analogy of a stockholder's suit, that it was within the power of the Board to inquire whether the conduct of Pan American, in opposing the extension, was characterized by "fraud" or "illegality" as against W. R. Grace & Co., its fellow stockholder, and that, if the Board found either of these issues against Pan American, it might then hold that W. R. Grace & Co. had the right "to speak for Panagra, and by doing so to make the application a voluntary one" (R., p. 370).

5. Petitions for certiorari to review said decision by the Circuit Court of Appeals were filed by Pan American

Airways Corporation and Pan American Airways, Inc., and also by Eastern Air Lines, Inc., all of which had been parties to the proceedings before the Board and before the Circuit Court of Appeals. Such petitions were granted by this Court on June 10, 1946. No further proceedings in Docket No. 799 have been taken by the Civil Aeronautics Board.

6. Under date of July 30, 1946, two agreements were made, one between Pan American Airways, Inc. and Panagra, and the other between Pan American Airways Corporation and W. R. Grace & Co. The agreement between Pan American Airways, Inc. and Panagra (hereinafter called the "Through Flight Agreement") provided that Pan American Airways, Inc. would, at Panagra's request, charter any aircraft operated by Panagra into the Canal Zone from Lima, Peru or any point south thereof "for through operation from the Canal Zone over one of PAA's routes to the continental United States and for return operation to the Canal Zone over the same route" and for other cooperative arrangements between the parties. The Through Flight Agreement was specifically subject to the approval of the Civil Aeronautics Board under the applicable provisions of the Civil Aeronautics Act and was to become effective only upon an order of the Board approving the agreement becoming final. The agreement between Pan American Airways Corporation and W. R. Grace & Co. ratified the Through Flight Agreement and provided in paragraph 6 as follows:

> "6. *Pending Litigations.* The parties will forthwith make suitable application to the Supreme Court of the United States and to the Civil Aeronautics Board requesting that the proceedings now pending in the said court and before the said Board relating

to the controversies between them shall be kept *in statu quo* until the Civil Aeronautics Board shall have made a final order in the proceeding relating to the Panagra-PAA contract contemplated by paragraph 20 thereof and, if a timely proceeding to review any such order shall be instituted, until such proceeding for review shall have been finally determined. Upon an order of the Civil Aeronautics Board approving said contract having been made and become final, the parties will make appropriate applications for the dismissal of all such proceedings."

7. By order Serial No. E-570, dated May 5, 1947, the Civil Aeronautics Board approved "the through flight agreement between Pan American Airways, Inc. and Pan American-Grace Airways, Inc. dated July 30, 1946, and the companion agreement between Pan American Airways Corporation and W. R. Grace and Co., dated July 30, 1946" subject to the condition that such approval should be for a term of three years from the date of the Board's order, at which time the Board, without further hearing, if deemed appropriate, might extend the approval for such period as might be desirable at that time, and to certain other minor conditions and modifications. By agreement dated May 28, 1947, Pan American Airways, Inc. and Panagra accepted the conditions and modifications prescribed by the Civil Aeronautics Board and further provided that the Through Flight Agreement should become effective immediately. On the same date an agreement was made between Pan American Airways Corporation and W. R. Grace & Co. ratifying this action and further providing that the agreement between them dated July 30, 1946, should become effective immediately except as to paragraph 6, which should become effective only upon the order of the Board dated May 5,

1947 becoming final, or such earlier date as might be agreed upon. Services under the Through Flight Agreement were instituted on May 31, 1947, and have been regularly conducted since that date.

8. By order Serial No. E-728, dated July 31, 1947, the Civil Aeronautics Board overruled exceptions and denied petitions for reconsideration of the Board's order Serial No. E-570 approving the agreements of July 30, 1946. The sixty-day period provided by Section 1006 of the Civil Aeronautics Act for petitioning for review of the Board's said order No. E-570 has now expired without any petition for review having been filed. The Board's said order has thereby become final within the meaning of the agreement between Pan American Airways Corporation and W. R. Grace & Co.

9. The Through Flight Agreement and the companion agreement of July 30, 1946, between Pan American Airways Corporation and W. R. Grace & Co. effectively dispose of the controversy which formed the subject matter of the writs of certiorari issued by this Court. These agreements were intended as a settlement of the difficulties which had given rise to this litigation and were approved by the Civil Aeronautics Board on that basis.

WHEREFORE, Pan American Airways Corporation, Pan American Airways, Inc., W. R. Grace & Co. and Pan American-Grace Airways, Inc. move this Court that the writs of certiorari granted on June 10, 1946 in the above-entitled proceedings be dismissed, without costs to any of the parties as against the others, on the ground that no con-

troversy between the parties now exists and that these causes have become moot.

Respectfully submitted,

PAN AMERICAN AIRWAYS CORPORATION
and
PAN AMERICAN AIRWAYS, INC.

By HENRY J. FRIENDLY
HENRY J. FRIENDLY
Their Attorney

W. R. GRACE & CO.

By JOHN T. CAHILL
JOHN T. CAHILL
Its Attorney

PAN AMERICAN-GRACE AIRWAYS, INC.

By W. F. COGSWELL
W. F. COGSWELL

H. PRESTON MORRIS
H. PRESTON MORRIS
Its Attorneys

NOVEMBER 24, 1947.

Per Curiam Decisions.

No. 4. PAN AMERICAN AIRWAYS CORP. ET AL. *v.* W. R. GRACE & CO. ET AL.; and

No. 5. EASTERN AIR LINES, INC. *v.* W. R. GRACE & CO. ET AL. Certiorari, 328 U. S. 832, to the Circuit Court of Appeals for the Second Circuit. *Per Curiam:* The motion to dismiss is granted and the writs are dismissed on the ground that the cause is moot. *Henry J. Friendly* for petitioners in No. 4. *E. Smythe Gambrell* for petitioner in No. 5. *John T. Cahill* and *Fred J. Knauer* for W. R. Grace & Co., and *W. F. Cogswell* and *H. Preston Morris* for the Pan American-Grace Airways, Inc., respondents. Reported below: 154 F. 2d 271.